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COMMENTS AND OBSERVATIONS OF GOVERNMENTS ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND ADOPTED ON FIRST READING BY THE INTERNATIONAL LAW COMMISSION AT ITS FORTY-THIRD SESSION

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* The reply sent on behalf of the Nordic countries is reproduced under the heading "Norway".

INTRODUCTION

1. At its forty-third session, in 1991, the International Law Commission provisionally adopted on first reading the draft articles of the draft Code of Crimes against the Peace and Security of Mankind. At the same session, the Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles be transmitted, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 1/

2. By paragraph 9 of resolution 46/54 of 9 December 1991, and again by paragraph 12 of resolution 47/33 of 25 November 1992, the General Assembly drew the attention of Governments to the importance, for the Commission, to have their views on the above-mentioned draft articles and urged them to present their comments and observations in writing by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters dated respectively 20 December 1991 and 1 December 1992 to Governments, inviting them to submit their comments and observations by 1 January 1993.

4. As of 1 March 1993, the Secretary-General had received 22 replies from Member States and one reply from a non-member State, the text of which appears in the present document. Replies received subsequent to the above-mentioned date will be included in addenda to the present document.

5. For the convenience of the reader, the text of the draft articles adopted by the Commission on first reading 2/ is reproduced below.

Notes

1/ *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), para. 174.

2/ Ibid., chap. IV, sect. D.

I. TEXT OF THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, ADOPTED ON FIRST READING BY THE COMMISSION AT ITS FORTY-THIRD SESSION

PART I

CHAPTER 1. DEFINITION AND CHARACTERIZATION

Article 1

Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2

Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

CHAPTER 2. GENERAL PRINCIPLES

Article 3

Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

Article 4

Motives

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

Article 5

Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

Article 6*

Obligation to try or extradite

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

Article 7

Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

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* This article will be reviewed if an international criminal court is established.

Article 8

Judicial guarantees

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular, he shall have the right to be presumed innocent until proved guilty and have the rights:

(a) in the determination of any charge against hime, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

Article 9

Non bis in idem

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.*

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* The reference to an international criminal court does not prejudge the question of the establishment of such a court.

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court or by a national court for a crime under this Code if the act which was subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.*

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgement took place in the territory of that State; or

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

Article 10

Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

Article 11

Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

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* The reference to an international criminal court does not prejudge the question of the establishment of such a court.

Article 12

Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

Article 13

Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

Article 14

Defences and extenuating circumstances

1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

PART II

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15

Aggression

1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to ...].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the

/...

Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on

Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 16

Threat of aggression

1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to ...].

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

Article 17

Intervention

1. An individual who as leader or organizer commits or orders the commission of an act of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to ...].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

Article 18

Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to ...].

Article 19

Genocide

1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to ...];

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Article 20

Apartheid

1. An individual who as leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced [to ...].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(a) denial to a member or members of a racial group of the right to life and liberty of person;

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Article 21

Systematic or mass violations of human rights

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- deportation of forcible transfer of population shall, on conviction thereof, be sentenced [to ...].

Article 22

Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

/...

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

Article 23

Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law shall, on conviction thereof, be sentenced [to ...].

2. A mercenary is any individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any individual who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State in whose territory the act is undertaken.

Article 24

International terrorism

An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- undertaking, organizing, assisting, fiancing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced [to ...].

Article 25

Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission of any of the following acts:

- undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

Article 26

Wilful and severe damage to the environment

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...].

II. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES

AUSTRALIA

[Original: English]

[14 January 1993]

Australia congratulates the International Law Commission (ILC) on its adoption on first reading of the draft articles on the draft Code of Crimes Against the Peace and Security of Mankind. It considers, however, that there are some difficulties with the Code as presently drafted. The comments below address both general issues of concern and specific areas which in the opinion of Australia require further attention by the Commission.

I. GENERAL COMMENTS

Scope of offences

Australia notes that the draft Code deals with a broad range of crimes against the peace and security of mankind. As currently drafted, however, it does not include a number of serious crimes such as piracy, hijacking and crimes against internationally protected persons. The Commission has not explained the reasons for these omissions. There should be no gaps in the Code, if it is intended to deal fully with crimes against the peace and security of mankind.

Relationship between the Code and the existing multilateral conventions

The international community has developed an increasingly substantial body of international criminal law in recent decades through the conclusion of multilateral treaties. These treaties enjoy broad support. They have evolved enforcement mechanisms which rely on national legal systems and courts reinforced by cooperation between States parties in the extradition of alleged offenders and mutual legal assistance in preparing prosecutions.

Australia believes the Commission should give attention to elaborating the relationship between the draft Code and these multilateral conventions. States parties will need to be able to reconcile their obligations under the multilateral conventions to which they are already party and the Code.

Australia acknowledges that this will be a difficult task. The Code overlaps with and replicates definitions of offences already dealt with under the conventions. In a number of cases the Code either omits elements of an existing crime or reduces its scope. For example, article 25 of the Code repeats only one element of article 3 (1) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 United Nations Convention).

Jurisdictional questions will also arise in settling the relationship between the Code and the multilateral conventions. The conventions all recognize the concept of universal jurisdiction in one form or another. Will the Code affect that by overlaying an international jurisdiction based on the principle of territoriality or some other principle? The Commission will need to take this into account in considering jurisdictional issues under the Code.

Setting penalties

Australia notes that penalty provisions have been included in the draft code on the basis that the principle "nulla poena sine lege" so requires. States, however, have not believed it necessary to include specific penalty provisions in the multilateral conventions referred to above. Instead, States parties have been required to create appropriately serious penalties in their domestic law for crimes dealt with under the conventions. Australia accepts, however, that there would be a need to establish specific penalties in any cases where the exclusive jurisdiction to try crimes under the Code lay with an international criminal tribunal.

Relationship to an international criminal tribunal

Australia notes that the proposed establishment of an International Criminal Tribunal is a separate issue to the draft Code, but is nevertheless relevant. The Commission's commentary foreshadows a strong link, to the point of determining who should institute proceedings and, in respect of such offences, the possible exclusive jurisdiction of such a tribunal. Australia considers that it is only in so far as the Code deals with major war crimes that the questions of exclusive jurisdiction might arise, but even here it is not apparent that such jurisdiction should necessarily be exclusive. Australia welcomes the request by the Sixth Committee at the forty-seventh session of the General Assembly for the Commission to consider separately the issues of the draft Code of Crimes and a draft statute for an international criminal court.

II. COMMENTS ON SPECIFIC ARTICLES

Article 6 (Obligation to try or extradite)

Australia notes that article 6 of the draft Code places an obligation on a State in whose territory an alleged offender is found either to try or to extradite him or her. The obligation to "try or extradite" is to be found in many multilateral conventions dealing with crimes in international law and is of fundamental importance to the enforcement of these conventions. The necessity of its incorporation in the Code cannot be questioned.

Australia believes, however, that consideration should be given to the question whether article 6 should contain more detailed provisions governing the extradition of alleged offenders. Such provisions might deal with the grounds on which other countries could seek extradition, the process of extradition under the Code, the possibility of extradition under existing treaties or arrangements between the countries concerned and the creation of extradition relationships between countries for the purposes of crimes under the Code where no such relationships already exist.

In addition to the obligation to "try or extradite", Australia believes that an obligation should be imposed on States to assist each other in investigating and prosecuting crimes under the Code. Evidence pertaining to the commission of a crime could well need to be obtained from several countries. Failure to secure such evidence from one or more countries because of their lack of cooperation could seriously or even fatally weaken the prosecution of an alleged offender. An example of a mutual assistance provision is to be found in article 7 of the 1988 United Nations Convention. This provision makes comprehensive provision for mutual legal assistance between parties to the Convention. The extent of any such provision in the Code would require detailed consideration.

Article 8 (Judicial guarantees)

Australia believes this article provides the minimum guarantees necessary to ensure that an alleged offender would receive a fair trial.

Article 9 (Non bis in idem)

Australia considers there are difficulties with this article.

Paragraph 1 provides for full protection against prosecution for crimes under the Code where persons have already been acquitted or convicted by an international criminal court.

Paragraph 2, however, provides for a more limited protection against "double jeopardy" in the case where a person has already been finally acquitted or convicted by a national court. The protection offered by paragraph 2 is made subject to exceptions contained in paragraphs 3 and 4.

Paragraph 3 envisages that a person can be tried both under the Code and the domestic criminal law of a State for the same course of conduct. Where a national court renders "judgement" (which could either be a conviction or acquittal) on a person under domestic criminal law, the same court pursuant to paragraph 3 would then have the jurisdiction to try that person for offences against the Code arising from the same conduct. Thus a person acquitted under domestic criminal law could be convicted under the Code for the same course of conduct. Although such cases might not be common, they certainly would weaken the concept of "double jeopardy" which is a fundamental principle of the criminal law of many countries.

Paragraph 5 does seek to provide some protection for a person who has been convicted under domestic criminal law for an act and who is subsequently convicted under the Code for the same act by requiring the court trying that person under the Code to deduct any penalty "imposed and implemented" for the previous conviction. Where, however, the penalty "imposed and implemented" under domestic criminal law is identical to the one to be imposed under the Code, a question does arise as to the utility of the second trial of that person. It may even be the case that the penalty under the Code could be less than the one imposed under domestic criminal law.

Article 14 (Defences and extenuating circumstances)

Australia believes that an effort should be made to elucidate the reference to "defences under general principles of law" in paragraph 1 of article 14. If the Code is to deal with some essential ingredients of a crime (e.g., penalties), then it should also deal with other necessary incidents such as defences. In systems with constitutional guarantees of due process, draft article 14 might well be held to be unconstitutionally vague.

Australia also believes consideration should be given to separating article 14 into two articles: one dealing with defences and the other dealing with extenuating circumstances. As noted by some members of the Commission, defences and extenuating circumstances are two different concepts best treated separately.

Article 15 (Aggression)

Draft article 15 encompasses, in addition to wars of aggression, unjustified acts of aggression short of war. This goes beyond existing international law which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

A further difficulty arises from the reference in draft article 15 to the Security Council. The definition of aggression both includes (draft article 15 (4) (h)) "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" and excludes (draft article 15 (3)), acts which the Security Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the Code and the Security Council is an exceptionally difficult problem, as the Commission notes. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Article 16 (Threat of aggression)

Draft article 16 extends criminal liability to those leaders who use threats of aggression to further their cause. Australia notes that the General Assembly resolutions which reiterate the prohibition of Article 2, paragraph 4, of the Charter have not referred to the threat of force as an international crime. Australia recognizes that a threat to use force is an illegal act for which an offending State may be held responsible. However, as is the case with draft article 15, it may be doubted that States are willing to accept the actual criminalization of all threats of intervention/aggression.

Article 17 (Intervention)

Draft article 17 applies to leaders who intervene in the internal or external affairs of another State by organizing or financing subversive or terrorist activities. While intervention is a concern of an international system committed to maintaining peace and security and premised on the sovereignty of its constituent units, it is not at present a crime under international law. Australia considers, given the doubt as to the normative force of the non-intervention norm, particularly in respect of the low-level intervention described as criminal in draft article 17 and the lack of jurisprudential support for its criminalization, that its inclusion in the Code requires further consideration.

Article 18 (Colonial domination and other forms of alien domination)

The draft article refers to the rights of peoples to self-determination as enshrined in the Charter of the United Nations. There is considerable debate about what this right encompasses, and it does not appear satisfactory to define the elements of a criminal offence by reference to it.

Australia also has difficulties with the phrase "alien domination". According to the ILC commentary, alien domination refers to "foreign occupation or annexation". This would appear to be a category of aggression rather than an offence against the right to self-determination. Further, this phrase broadens the scope of the article well beyond the colonial context to which the principle has classically been applied.

Article 19 (Genocide)

While Australia has no difficulties with the substance of this article, which is based entirely on the definition in article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

The penalty to be specified in article 19 (1) may well be inconsistent with the Genocide Convention which requires States parties to "provide effective penalties for persons guilty of genocide".

Article 20 (Apartheid)

Australia would suggest that the wording of the draft article might be modified so as to reflect more closely the 1974 International Convention on the Suppression and Punishment of the Crime of Apartheid.

Under paragraph 2 of draft article 20, the policies or practices must be committed for the purpose of racial domination and oppression. This incorporates an intention element which may be difficult to prove. The 1973 Convention states: "inhumane acts resulting from the policies and practices of apartheid ... are crimes violating the principles of international law". This disposes of the intention element required in the draft Code and better states the position under international criminal law.

It is unclear whether the leaders or organizers acting on their own initiative, rather than on the basis of government policies and practices, are intended to be included in this article.

Article 21 (Systematic or mass violations of human rights)

Australia notes the stated intention of the Commission that only the most serious international delicts be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

There are, however, some problems with draft article 21 in its current form. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in this draft article. It notes the view of the Commission that, as the definitions are included in other international instruments, it is unnecessary to repeat them in the Code. However, not all the crimes are so defined. There is, for example, no agreed definition of persecution in any international instrument.

Reliance on other instruments for definitions of the crimes in article 21 could also cause difficulties. For example, the definition of torture in the 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the *chapeau* to article 21 indicates that responsibility for any of the enumerated crimes extends to any individual committing the offence.

Australia notes in this regard that draft articles 15, 19, 20, 22 and 23 include definitions of offences despite the fact that definitions are to be found in other international instruments.

Draft article 21 is also limited in its scope in that it does not (as in the case with draft articles 15 and 16) allow for "other similar acts". Australia agrees with the observation set out in the Commission's commentary that the practice of systematic disappearance of persons is worthy of special reference in the context of this draft article. It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Article 22 (Exceptionally serious war crimes)

Draft article 22 enumerates the various acts which shall be deemed exceptionally serious war crimes. Most of these are included in the various treaties and conventions that make up international humanitarian law.

Article 22 differs, however, from customary international law in that it creates a new category of "exceptionally serious war crimes". As under international humanitarian law war crimes are themselves exceptionally serious transgressions of the laws of war, defined as grave breaches in the various conventions and protocols, it is unclear what the words "exceptionally serious" are intended to mean. If these words are intended to refer to the same conceptual category as grave breaches under the conventions and protocols, then there are a number of inconsistencies between the grave breaches under laws of war and the specific crimes listed at draft article 22.

For example, the 1949 Geneva Conventions' articles 50 (First Convention) and 51 (Second Convention) define grave breaches to include "extensive ... appropriation of property" and destruction of property "not justified by military necessity and carried out unlawfully and wantonly". Neither the element of wantonness nor the absence of military necessity is necessary to make out the crime in the draft article. Similarly, the conditions relating to large-scale destruction of civilian property (paragraph 2 (e)) and wilful attacks on property of exceptional religious, historical or cultural value (paragraph 2 (f)) are not consistent with the offences set out in the draft article.

Article 23 (Recruitment, use, finance and training of mercenaries)

Australia notes that the wording of paragraphs 2 and 3 of draft article 23 defining mercenary is the same as that adopted by the General Assembly in article 1 of the 1989 Convention against the Recruitment, Use, Finance and Training of Mercenaries, which recognizes mercenary activity as an international crime.

There are, however, a number of significant differences between draft article 23 and existing international law for which no explanation is provided by the Commission. Draft article 23 is, for example, limited to acts of recruiting, using, financing or training of mercenaries. It does not include acting as a mercenary, which is recognized as a crime in article 3 of the 1989 Convention.

A second problem is the limitation of the crime to agents or representatives of a State. It should be considered whether agents or representatives of non-State entities should also be included. If involvement in mercenary activity is to be an international crime it should be irrelevant to their criminal liability whether the individual responsible for that involvement is linked to a State entity or a non-State entity.

Another difficulty with the draft article is the restriction placed on the target of the mercenaries' activities. Under the draft article, unless the activities are directed against another State or are for the purpose of opposing the legitimate exercise of the right of self-determination, an offence has not been committed. It is conceivable that mercenaries could be recruited, used, financed or trained for activities against an international organization - not a State and not a self-determination movement - and those activities not be punishable under draft article 23.

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Article 24 (International terrorism)

Australia has difficulties with the drafting of this article. It notes in particular that the definition is not expressed to include an element of violence. Is therefore the offence intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agents or representatives need to be acting in their official capacity. The absence of intention or motive from the definition (cf. the 1937 Convention for the Prevention and Punishment of Terrorism) also needs explanation.

Article 25 (Illicit traffic in narcotic drugs)

Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, Australia has been an active participant in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

Australia acknowledges the concerns underlying article 25. It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of article 25 with existing conventions, in particular, the 1988 United Nations Convention.

The enumerated acts constituting crimes under article 25 are inconsistent with those listed in the 1988 United Nations Convention. Article 3 of that Convention describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted on the ground that they are not of sufficiently serious nature to attract international criminal sanctions, others perhaps should be included.

The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution and money laundering.

Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the Code.

It is unclear why the phrase "psychotropic drugs" is used only in paragraph 3, when the whole article is intended to cover these substances.

Article 26 (Wilful and severe damage to the environment)

The Commission's commentary refers to the possible inconsistency between the requirement in draft article 26 that the damage be caused or ordered to be caused wilfully and the possibility of a conviction under paragraph 2 (d) of draft article 22 for employing methods not only intended but even "likely" or "which may be expected to" cause the damage. It was argued by some members of the Commission that the requisite mens rea in draft article 26 should be lowered so as to be consistent with draft article 22. This inconsistency could otherwise result in a deliberate violation of some regulations on protection of the environment for economic gain which caused widespread, long-term and severe damage, but did not cause that damage as the consequence of a will to do so, and did not therefore amount to criminal behaviour. Australia considers that this argument has merit and that if such violation may have been expected to cause the requisite degree of damage, then it should be treated as an international crime.

AUSTRIA

[Original: English]

[28 January 1993]

General remarks

First of all, Austria wishes to express its appreciation for the work of the International Law Commission (ILC) elaborating the draft Code of crimes. Austria has noted with satisfaction the progress achieved by the ILC on this topic, which ranks high on the international agenda. Austria has consistently supported all endeavours to create an international criminal court. It is fully committed to all efforts that will enhance and strengthen the international legal order by ensuring that individual perpetrators of serious crimes against the peace and security of mankind will be held fully accountable.

Article 1

The expression in square brackets should be dropped at the place envisaged by the draft. It should rather be inserted after the words "constitute crimes". In the Austrian view the crimes enumerated in part II are liable to punishment if committed with intent unless otherwise determined.

Article 2

Concerning this article, dealing with the characterization of an act or omission as a crime against the peace and security of mankind, the second sentence of the article is not strictly necessary. The fact that the characterization of an act or omission as a crime against the peace and security of mankind is not affected by whehter or not such act or omission is punishable under internal law is already to be understood from the first sentence, according to which the characterization is independent of internal law.

Article 3

Paragraph 1 regulates in an undifferentiated way criminal responsibility without taking into account circumstances excluding criminal responsibility (cf. article 14). This provision should be completed as follows: "... if there are no circumstances excluding the criminal responsibility".

The wording of paragraph 3 does not sufficiently clarify that under the present draft Code an attempt to commit a crime under circumstances which could objectively not lead to the actual commission of the crime would not entail criminal responsibility. Article 3 could therefore be made more specific by inserting a paragraph 4 with the following wording: "4. Any attempt to commit a crime or participation under circumstances would could objectively not lead to the actual commission of the crime does not entail criminal responsibility".

Austria shares the opinion of some members of the Commission urging an examination to clarify for which types of crimes (covered by the present draft Code) the attempt to commit a crime could be considered as liable to punishment. Therefore the expression in square brackets in paragraph 3 should for the time being be maintained.

Article 4

The motive of the commission of a crime could be taken into account as an aggravating or as an extenuating circumstances (cf. article 14).

Article 8

Austria finds itself in general agreement with the substance of this provision, which essentially corresponds to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. From a linguistic point of view, the introductory words "have the right to" could be dropped.

Austria shares the view of the Commission that the appointment of a counsel for the defence is necessary in all cases covered by the present draft Code (cf. paragraph 5 of the commentary to article 8).

Article 9

Regarding this provision, attention is drawn to the problem of a non bis in idem effect caused by a sentence of acquittal by the State where the crime took place in the case where the perpetrator was acting on behalf of this State. This problem seems to be dealt with in paragraph 4 (b).

The word "punishment" in paragraph 2 should be replaced by "penalty".

The considerations elaborated under point 3 (b) of the commentary to article 9 should find expression in the wording of paragraph 4, which thus could be completed as follows:

> "... and these States consider that the decision did not correspond to a proper appraisal of the act or to its seriousness."

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Article 11

After the word "if" in the third line the following words should be inserted: "... he knew or should have known of the illegality of the order and if ..."

Article 14

This article deals with two different principles: the principle of taking into account circumstances excluding criminal responsibility (paragraph 1) and the principle of regarding extenuating circumstances (paragraph 2). The latter principle (as well as aggravating circumstances) comes into play by determining the extent of the penalty applicable to the perpetrator of a crime but has nothing to do with criminal responsibility.

The negative attitude of some members of the Commission to take into account reasons for exemption from punishment (i.e., plea of insanity) with regard to crimes against the peace and security of mankind cannot be shared.

Paragraph 2 should be completed by mentioning aggravating circumstances which are also to be taken into account by determining the extent of penalty. The view of some members of the Commission regarding the insertion of a descriptive enumeration of possible extenuating (and aggravating) circumstances is shared.

Part II

In principle it must be pointed out that the incorporation of provisions on applicable penalties seems indispensable. The view of some members of the Commission to provide one single scope of penalty applicable to all crimes defined under the Code cannot be shared with regard to the differences of seriousness of the crimes. Therefore the expression in square brackets concerning the extent of penalty in the articles of part II should be maintained.

The words "on conviction thereof" in articles 15 to 26 are unnecessary and should be dropped.

Article 15

The binding effect of decisions of the Security Council provided for in paragraph 5 seems doubtful in so far as it might infringe upon the competence of a judicial organ to decide on the existence of a material element of a specific crime (an act of aggression).

Article 16

The word "would" in the second line of paragraph 2 is unnecessary and should be dropped.

Article 17

The expressions in square brackets should be retained.

Article 18

The expression "colonial domination" should be defined specifically in an added paragraph 2.

The words "contrary to the right of peoples to self-determination" should be replaced by the following wording: "thus infringing the right of peoples to self-determination".

Article 20

As regards this draft article Austria finds itself in general agreement with the substance of that provision. However, there are certain doubts as to whether the notion of apartheid should really be retained in this instrument. A more general formulation in the title of this article might be preferable, for instance "Institutionalized racial discrimination".

Articles 21 and 22

The relation between the provisions of article 21 and article 22 (ideal concurrence of crimes or cumulation) asks for further clarification. If article 21 should only be applicable in times of peace, this should be emphasized.

The expression in square brackets in article 22, paragraph 2 (a), should be retained. The fact that the enumeration is only descriptive is sufficently emphasized by the words "in particular".

Article 23

In principle it may be asked if this crime is that serious to be inserted in the present draft Code. The words "in any other situation" in paragraph 3 ask for further clarification.

Article 24

This provision should read as follows, which would also allow to define the term "terrorist activities":

> "1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:
>
> - undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State, shall be sentenced (to ...).

> 2. Terrorist activities are acts directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public."

Article 25

It remains to be seen if this crime should be inserted in the present Code of crimes. It is doubtful whether illicit traffic in narcotic drugs is a crime against the peace and security of mankind. Furthermore, the consequences linked with the insertion of the Code (i.e., the non-prescriptibility) do not seem desirable from a political point of view.

Article 26

Since perpetrators of this crime are usually acting out of the motive to make commercial profit, intent should not be a condition for liability to punishment.

BELARUS

[Original: Russian]

[28 December 1992]

The draft code of crimes against the peace and security of mankind was carefully studied in the Ministry of Justice and the Ministry of Foreign Affairs of the Republic of Belarus. As a result, the following comments have been prepared on the draft articles.

1. In general, the document drawn up by the International Law Commission is commendable. However, we feel that some individual provisions require clarification and redrafting.

2. The words "under international law" in article 1 should be deleted in order to standardize the terms denoting serious violations of international law, normally referred to as crimes. At present, different concepts - "international crimes" committed by States, and "crimes under international law" committed by individuals - are used to denote actions which, objectively speaking, have an identical goal, although they are committed by different perpetrators. The deletion of the words in square brackets would serve to avoid semantic confusion.

It is to be hoped that in future the International Law Commission will try to make the provisions of the code applicable to all perpetrators, including States; this will also make it possible to resolve, in principle, the question of the characterization of crimes. The objections that were raised in this connection (the fact that perpetrators are subject to different regimes from the standpoint of penalties and procedural rules) essentially relate to procedural law and need not be taken into account at the current stage of work on the substantive provisions of the code. They should be resolved when the procedure for implementing the provisions, which will be different for different perpetrators, is considered. This procedure will obviously have to be worked out in stages: starting with the procedure in respect of the responsibility of individuals, taking into account the criterion of the participation of States, and ending with the procedure in respect of the legal responsibility of States for international crimes.

3. Article 3 should also provide for the responsibility of any individual who aids, abets or provides means and other services after the commission of a crime against the peace and security of mankind with a view to concealing both the crime itself, and the guilty parties. It would be advisable also to provide for the responsibility of any individual for an omission - for the failure to report such a crime to the juridical authorities both during the stage of preparation and when it has been committed. In all cases, it should be stipulated that the act or omission must have been deliberate.

Furthermore, article 3, paragraph 2, should include a special reference to the criminal nature of issuing an order to commit a crime against the peace and security of mankind.

In article 3, paragraph 3, the words "[as set out in arts. ...]" should be deleted. It would be neither practicable, nor advisable to consider every crime with a view to determining whether the characterization of attempt is applicable to it; the competent courts should have the right to decide for themselves whether this characterization is applicable to the specific content of cases before them.

4. Bearing in mind the preliminary nature of article 6, we believe that it should establish two possible types of jurisdiction for the implementation of the code: universal and international.

In order to change the existing situation as regards the machinery for universal jurisdiction (its basic component - extradition - has so many limitations, which, in any case, do not accord with the nature of crimes against the peace and security of mankind, that it is extremely difficult to implement and at the same time allow the idea of establishing an international criminal court to demonstrate its advantages, a rigid comparison should be avoided. In our view, a system of universal jurisdiction and an international criminal court are far from exclusive. Most of the drafts concerning the establishment of such a court do not afford it exclusive jurisdiction in relation to a certain group of criminal offences, but give States the option of choosing between the two mechanisms. This solution is appropriate in cases where a State did not participate in any way in the commission of a crime.

In the case of international crimes in which a State participated, in the great majority of cases the system of universal jurisdiction is not an alternative. If there is no external coercion, it will be totally ineffective. However, if it is applied under coercion, that will lead to a situation where national judges will deliver verdicts condemning the actions of other States.

Both these mechanisms therefore need to be further developed as alternative measures for the implementation of the code. First, the provisions relating to extradition for crimes against the peace and security of mankind need to be made more specific. Unfortunately paragraph 2, as currently formulated, does not resolve the problem of how to establish an order of priority for requests for extradition in the event that one individual has committed several such crimes, including crimes in the territory of various States. Second, in our view, further study should be made of the question of establishing an international criminal court which would be competent to judge crimes against the peace and security of mankind, and special consideration should be given to the criterion of the participation of States. We are gratified that this point of view is shared by most States Members of the United Nations, as was demonstrated by the discussion in the Sixth Committee of the General Assembly during its forty-seventh session.

The formulation of article 6, paragraph 1, would be improved if it referred not to "an individual alleged to have committed a crime" but to "an individual in respect of whom there are grounds to believe that he committed a crime against the peace and security of mankind". This would exclude any possibility of applying article 6 against an individual in the absence of information about his guilt.

5. In article 11, the words "if, in the circumstances at the time, it was possible for him not to comply with that order" should be replaced by the words "if, in that situation, he had a genuine possibility of not carrying out the order".

6. In our view, the Russian version of article 14 should refer to "смягчающих вину обстоятельствах" rather than "смягчающих ответственность обстоятельствах". Moreover, this article should be divided into two separate articles, since paragraphs 1 and 2 refer to different legal concepts. In the article referring to the grounds which would allow for adjustability of the penalty, these grounds should be specified and should include self-defence, state of necessity, coercion and bona fide confusion (error). The possibility of applying them to each type of crime could be left for the court to consider.

The question of extenuating circumstances can be considered in conjunction with the question of penalties. It would be preferable to formulate a general article on penalties for all crimes, establishing the minimum and maximum penalties and listing the extenuating circumstances. An alternative to including a scale of penalties, in the event that the provisions of the code are applied by national courts, could be to require that the crimes should be punished in a manner commensurate with their extreme danger and gravity.

The list of extenuating circumstances could be indicative in nature and could include, in particular, the commission of a crime under duress, on the order of a superior; and sincere remorse or acknowledgement of guilt.

It is commendable that the draft code refrains from drawing a distinction between crimes against peace, war crimes and crimes against humanity.

At the same time, care should be taken to avoid distinguishing between crimes on the basis of State participation, at the stage of formulating substantive legal provisions. The criterion of State participation will be of crucial importance at a later stage - when the mechanism for implementing the code is worked out.

7. In the light of the above-mentioned considerations on penalties and the inclusion of article 3, which provides for the responsibility and punishment of an individual, the change that was made in 1991 to the initial provisions (these are now the new first paragraphs) of the articles of part II of the draft code, concerning the perpetrators of crimes against the peace and security of mankind, is hardly appropriate. In particular, the change relates to articles 15, 16, 17, 18, 20 and others, where the perpetrator of such crimes as aggression, the threat of aggression, intervention, apartheid, etc., is "an individual who as leader or organizer ...". In our view, this formulation restricts the category of individuals and the limits of their responsibility. Moreover, it runs counter to the general principles of responsibility and punishment laid down in article 3 of the draft code, which refers to the responsibility of any individual, regardless of whether or not he was a leader or organizer.

8. While welcoming the inclusion in article 15 of responsibility for the planning of aggression, the competent bodies of the Republic of Belarus consider that the list of criminal acts should also include the preparation of aggression, particularly since planning is only one of the elements of preparation.

With regard to the distinction made in the article between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Security Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed, in our view, is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some juridical procedure (for example, a requirement for the preliminary establishment of a commission of investigation), which would guarantee the objectivity of the Council's decision. Clearly this decision can in no way prejudge the question of the guilt of a particular individual in committing aggression.

If an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council will require further study.

9. In our view, the word "[armed]" in article 17, paragraph 2, should be omitted since economic measures can also be categorized as intervention. At the same time, article 17 should refer to the most serious forms of intervention, and the word "seriously" should therefore be retained in the text.

10. We feel that in article 24, the category of perpetrators of crimes of international terrorism should be expanded. The code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

11. Finally, we feel that, during the second reading of the draft Code, the International Law Commission, could revert to the question of the inclusion therein, as a crime against the peace and security of mankind, of the violation of a treaty designed to protect international peace and security.

BELGIUM

[Original: French]

[1 February 1993]

The draft articles on the draft Code of Crimes against the Peace and Security of Mankind, as prepared by the International Law Commission, are largely acceptable. The draft is the product of particularly thorough consideration of a set of juridical concepts applicable to various situations that are often difficult to define and for which it is hard to find a common denominator. Clearly, in theory there are other possible options, particularly with regard to the list of crimes. However, a broad consensus can be reached on this exhaustive, balanced draft.

The observations set out below deal with the following points: there is a lacuna, since the draft contains no articles on an international tribunal; comments on a number of concepts relating to the issue of definition and characterization; and some remarks on a number of crimes, chiefly genocide.

1. International tribunal

The fact that there are no articles on the competence of an international criminal tribunal clearly constitutes a lacuna. It would have been advisable to include in the draft Code of Crimes against the Peace and Security of Mankind a chapter on the establishment of an international criminal tribunal, specifying the competence of the tribunal and procedural modalities.

It has been said repeatedly that crimes constituting breaches of the international order must fall within an international jurisdiction. In fact, it is essential that there should be an international jurisdiction; without one, there is no guarantee that the perpetrators of crimes against the peace and security of mankind will be punished.

Where - in connection with a particularly serious matter concerning the conduct of States, regardless of whether it is a Government itself or its agents that are responsible for the criminal act in question - national courts are called upon to pass judgement on the conduct of foreign Governments, it is likely that they will not be equal to the task. The principle of universal prosecution and punishment and extradition procedures have proved largely ineffective in this connection.

The competence of an international tribunal should not, a priori, preclude the competence of national courts. However, in order to ensure that the system of prosecution and punishment is as effective and well-defined as possible, the international tribunal should be given not only concurrent competence with national courts but also the competence to pass judgement on decisions of national tribunals under appeal.

Furthermore, recourse to the international tribunal should not be optional. A reservation with regard to competence in this respect - as provided for in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, which stipulates that the international penal tribunal shall have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction - cannot be regarded as admissible. In that connection, J. Graven indicates as follows

> "However, that approach ignores the mandatory nature of the criminal jurisdiction. It is admissible, in some cases, to select the competent court (particularly the competent arbitral tribunal) to which to submit disputes; but it must not under any circumstances be possible, in the event of a criminal action or criminal proceedings, to avoid the criminal jurisdiction that has been established." (_Les crimes contre l'humanité_), Académie de droit international, 1950, Part I, p. 520)

2. _Definition and characterization_

(a) The draft Code does not define what is meant by crimes against the peace and security of mankind, but establishes a list of the crimes concerned.

It is not really necessary to choose between a conceptual definition and drawing up a list of crimes, since the two approaches are complementary. It is regrettable that no conceptual definition is given, since, whatever the difficulties involved in establishing such a definition, it remains true that the list of crimes must inevitably be based on it.

Several criteria could be used to define what is meant by crimes against the peace and security of mankind. In its commentary, the Commission refers to crimes which affect the very foundations of human society, with the crimes being considered in the light of their seriousness and the extent of their effects. A more accurate definition could be obtained by drawing a distinction between crimes against the peace and security of mankind and ordinary crimes. That distinction would apply in the case of breaches of the international order and responsibility on the part of a State, where the latter was responsible either directly, or indirectly because it tolerated the crime or failed to take the measures necessary to prevent situations constituting a breach of the international order from occurring.

If an article of the Code were to provide a definition of the crimes in question, the reference to international law contained in draft article 1 would be superfluous.

(b) It is vital that a scale of penalties for each crime should be included in the draft Code.

The crimes in question are essentially breaches of the international order. It therefore seems unusual that the establishment of penalties should be left to the discretion of internal laws, which would result in different penalties being applied to the same offence of causing a breach of the international order.

(c) The draft Code deals only with individual criminal responsibility and leaves undecided the question of the international criminal responsibility of States.

There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act on its improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.

Moreover, holding the State responsible for crimes, independently of the responsibility of the Government and agents of the State, would make the nation feel affected by the act in question, thereby making it difficult for the nation to lay all the blame on the Government, on which it has conferred political power.

(d) The concept of defences, as provided for under draft article 14, would appear difficult to apply to crimes against the peace and security of mankind.

The question thus arises of whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime was perpetrated.

3. Crimes against the peace and security of mankind

(a) Aggression and threat of aggression

Article 15, paragraph 5, provides that any determination by the Security Council as to the existence of an act of aggression is binding on national courts. The Security Council is the United Nations organ competent to determine the existence of any act of aggression or threat to the peace (Article 39 of the Charter of the United Nations). It therefore seems logical that a judge should be bound by those determinations, which are imposed on all States, and consequently on all State organs, including courts of law. This limitation of a judge's discretionary powers should be strictly interpreted in that the judge would be bound only to the extent that the Security Council, having had the case submitted to it, determines the existence or absence of aggression.

(b) Intervention

Keeping armed activities as the sole form of intervention is justifiable. The concept of a crime against the peace and security of mankind necessarily implies that a particularly serious act, threatening to the foundations of society, is involved. Intervention of an economic type, whose scope is difficult to assess, does not appear to fit the concept of a particularly serious act. However, assuming that the Code must include forms of intervention other than armed activities, the nature of those forms should be indicated.

(c) Genocide

With regard to the groups targeted by acts of destruction, the draft Code reproduces the exhaustive list contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide: national, ethnic, racial and religious groups. A non-exhaustive list of groups could quite easily have been produced.

A non-exhaustive list was referred to several times; the following are examples of such a list:

- The statement by France at the Nürnberg Trial referring to certain religious, national or racial groups;

- The definition of genocide in General Assembly resolution 96 (I), of 11 December 1946: "Genocide is a denial of the right of existence of entire human groups";

- The amendment proposed by France during the discussions in the Sixth Committee in connection with the drafting of the Convention of 9 December 1948: "particularly by reason of his nationality, race, religion, or opinions" (A/C.6/211).

The non-exhaustive nature of the list of groups is totally justified: genocide is a concept intended to cover a variety of situations which do not necessarily coincide with the few examples documented by history. Thus, in the case of the acts of genocide perpetrated in Cambodia, the target group did not have any of the characteristics included in the definition of genocide set out in article II of the Convention of 9 December 1948.

Those in favour of an exhaustive list of the target groups have pointed out the need to avoid any vague legal definition. Such an approach could be adopted, but care must be taken to ensure that the list is in fact exhaustive. It should be noted, however, that both international and internal law rely on concepts that are not well defined; this is particularly true of the concepts of "jus cogens", "public order" and "morals".

It has also been pointed out that acts of genocide which fall outside the scope of the concept of the crime of genocide as defined under the Convention of 1948, could be regarded as "systematic or mass violations of human rights". There are two objections to this approach: genocide differs from systematic violations in that in the case of genocide a particular group is the target; and the list of acts is not the same in the case of each of the two crimes under discussion.

Consequently, the definition of genocide should be reviewed. There are two possible solutions: either adopting a non-exhaustive list of groups, or supplementing the exhaustive list with other notions such as those of political groups and socio-economic groups. It should be noted, in this connection, that reference was made to the concept of a political group during the discussions in the Sixth Committee with respect to the crafting of the Convention of 9 December 1948.

(d) Article 26 deals with wilful and severe damage to the environment. As noted in the relevant commentary, cases of damage by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim is not to cause damage to the environment are excluded from the scope of article 26. The commentary also indicates that article 26 conflicts with article 22, on war crimes, because under article 22 it is a crime to employ means of warfare that might be expected to cause damage, even if the purpose of employing such means is not to cause damage to the environment.

This difference between articles 26 and 22 does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.

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BRAZIL

[Original: English]

[29 January 1993]

1. At the outset, it is worth noting that the general part of the draft should be revised. Articles 11 to 13 are in fact related to some aspects of individual responsibility and should be placed immediately following articles 3 and 4. Article 5 should conclude this first series of principles. Furthermore, in comparing the English, Spanish and French texts of the articles of the draft Code, we note that the first ones are flawed in the presentation of article 8, since they lack paragraph 1 and the chapeau of paragraph 2. We must emphasize the importance of the Spanish and French translations, particularly in view of the fact that Brazilian law is based on the system of civil law. In this context, it is worth recalling that the classic title of article 7 on the imprescriptibility of crimes is called, in the English translation, "Non-applicability of statutory limitations".

2. On the structure of the draft, we do not have any objection whatsoever. We could assume, however, that besides the general part and the part on characterization, additional parts shall be included corresponding not only to an international court but also to a system of execution of punishment, in which we could even consider an international correctional institution.

3. As far as the first article is concerned, on the definition of crimes, it would be preferable to delete the formula in square brackets, "under international law", since any crime which is defined in an international treaty is considered a crime under international law. At the most, we could agree with the suggestion put forward at the end of the commentary on this article, namely, that if the formula is retained it should be inserted in the second line of the draft article, after the words "constitute crimes".

4. There appears to be a contradiction between articles 2 and 3 of the draft. In accordance with article 2, a crime against the peace and security of mankind is "an act or omission". However, article 3 refers only to an individual who commits a crime (paras. 1 and 3) and to "commission of a crime". It does not make the distinction between act and omission which is also contemplated in article 5: "Prosecution ... does not relieve a State of any responsibility ... for an act or omission attributable to it."

5. Clearly this contradiction, which also indicates the existence of a lacuna in the draft, was not disregarded by the Commission. In fact, in the commentaries to article 10, the Commission considers that the word "acts" should be interpreted as "acts or omissions". This interpretation of the word "act" - according to the commentaries (para. 2) - "would form the subject, in due course, of a special provision explaining the meaning of the term whenever it is employed in the draft Code". Notwithstanding the formulation of this provision, the rule of article 3 should be reviewed in order to embody, among other norms of the draft, a provision similar, for instance, to paragraph 2 of

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article 13 of the Brazilian Criminal Code (similar to other criminal codes) which states that: "The omission is criminally relevant when a person who commits an 'omission' should and could act to avoid the result."

6. Still on article 3, it should be noted that the provision of paragraph 2 refers to at least three different acts, relating to delicts which would require specification: (a) aiding, (b) abetting and (c) inciting. As a matter of fact, the commentaries to article 3 extend for two items (3 and 4), stressing the importance that this paragraph be further developed and that its content be subject to in-depth and comprehensive analysis.

7. On paragraph 2 of article 3, it should be noted that the Spanish text seems to be different from the French text: the first refers to "asistencia o los medios", the other is related to "une aide, une assistance ou des moyens ...".

8. Paragraph 1 of article 6 should be improved since, not only for the trial but also for the extradition, the mere allegation of the commission of a crime against the peace and security of mankind would not be sufficient; supporting information must be presented.

9. Concerning article 8, subparagraphs (c) and (g) should also be improved. In fact, the right of an individual charged with a crime to communicate with the attorney of his own choice should be extended to the attorney assigned to him, in the case of subparagraph (e) of the same paragraph. Nevertheless, the right of having the free assistance of an interpreter should not be limited to the hearings but to all the phases of the proceedings.

10. Some provisions, such as articles 6 and 9, are linked to the question of whether or not an international criminal court is established. Article 9 is particularly puzzling. It aims at devoting the principle of "non bis in idem" among the national and international jurisdictions. However, the Commission drafted it before having decided the jurisdictional system to be applied (international criminal court or national courts). Therefore, a complex system of exceptions was established which ended up by bringing about negative effects, as in the draft of other articles (as article 6). As far as the first paragraph of article 9 is concerned, it should expressly state what is pointed out in the respective commentaries inserted in paragraph (2) of the commentary, namely "that the word 'acquitted' meant an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings". Concerning article 6, the future Code shall mention the difference arising from the extradition (which only applies in the case of a trial before a national court) or the handing over of an individual alleged to have committed a crime for a trial in an international court. Assuming that this international court is to be established, paragraph 3 of article 6 will no longer exist and the other paragraphs will encompass some possible modifications.

11. As far as article 14 is concerned, what is stated about the "defence and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based

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only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the great number of provisions of a broad scope seems to be one of the most difficult problems hampering the Commission's effort to codify. As far as the draft is concerned, criminal law, by its own nature and the values involved, requires a greater level of definition and demands a more detailed regulation.

12. Concerning the provisions of part II, in which the crimes are defined, we should select a restrictive characterization. The inclusion of crimes such as the threat of aggression (article 16) and the recruitment, use, financing and training of mercenaries (article 23) could be embodied in an international criminal code but not necessarily in the Code under examination. It also seems unjustifiable to include an article (article 17) on intervention, a concept too broad to be dealt with within the field of individual responsibility. The acts identified in the article could be considered crimes, but without reference to the general concept of intervention. It is understandable that the ILC may feel tempted to enlarge the mandate entrusted to it, seeking to prepare a draft Code which goes beyond the framework of crimes against the peace and security of mankind. This could lead, however, to negative results, among them inaccuracy and lack of technical accuracy in some of the provisions of the draft Code.

13. It should also be pointed out, however, that, with the exceptions of the crimes of aggression, genocide and apartheid (articles 15, 19 and 20), whereby the definitions do not stray from those in the existing international instruments, the characterization of crimes is not sufficient. In the case of article 21, although it is entitled "Systematic or mass violations of human rights", the text could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the limitative expression "in a systematic manner or on a mass scale", in order to indicate that the Code will only cover facts of international relevance committed or not with the toleration of the State power. Likewise, there is an international element in the crime of terrorism ("as an agent or representative of a State ... against other State") meaning that the crime described in article 24 may only be punished in accordance with the Code when it is committed or ordered by an agent or representative of a State against other State. The absence of an international element with regard to the crime in article 25 (Illicit traffic in narcotic drugs) is not justifiable. Likewise, the crime of wilful and severe damage to the environment is also characterized without any reference to the international element.

BULGARIA

[Original: English]

[4 February 1993]

A conceptual definition is preferable in article 1 of the draft, whereby a general meaning will be rendered for the term "crime against the peace and security of mankind". Our position is based on the understanding that in essence a conceptual definition defines the nature of a given type of crime, its basic characteristics and elements. It is necessary to outline precisely the method and principle which will be used to determine whether a given offence could be considered to be a crime against the peace and security of mankind. Thus, according to the types of crime listed further in the draft, a certain crime may formally have the characteristics of the given type of criminal act, but in the concrete circumstances its gravity may not be enough to qualify it as an aggression against the peace and security of mankind. In this way, better legal safeguards will be provided for the personal rights of the perpetrators. On the other hand, in order to observe the principle of criminal law stating that crimes and their respective punishments are determined only by law, it is necessary, as pointed out further on in the text, to set apart a special part of the Code, where the qualifying elements of this particular type of crime will be outlined. In this connection, a sentence should be added to the text of article 1 limiting the scope of the Code to the types of crime listed in it. Thus, the positive aspects of the two possible approaches to the matter could be made use of. We propose that circumstances qualifying the guilt should also be defined, such as participation in group or organized types of criminal acts. An argument in support of this view is that under a lot of internal laws, an organized or group form of committing a given type of crime is treated as an aggravating circumstance. A criminal act committed by an individual, on the one hand, and group and organized crime, which in most cases has much graver consequences for the peace and security of mankind, cannot be placed under a common denominator. In this connection we propose that the fact that a given crime was committed by a group or organization of people should be considered an aggravating circumstance in determining the type and size of punishment for crimes treated in this Code.

In line with the above, we suggest that the definition contained in article 1 of the draft Code be changed as follows:

"Article 1

"Definition

"1. For the purposes of this Code a crime against the peace and security of mankind is any act or omission committed by an individual, which is in itself a serious and immediate threat to the peace and/or security of mankind or results in violation thereof.

> "2. In particular the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

The texts of articles 9, 3 and 4 constitute a substantial violation of the basic principle of criminal law "non bis in idem", and in this sense they abuse human rights. In order to protect human rights, we propose that the following expression be added at the end of article 3:

> "... provided that the sanction enforced on him is apparently not corresponding to the seriousness of the committed crime."

The same phrase should be added at the end of paragraph 4 of article 9, before the subparagraphs to it.

Such an approach makes it possible to judge in each particular case whether the penalty imposed by a given State corresponds to the gravity of the crime committed, as well as to implement the clauses of paragraphs 3 and 4 of article 9 only in cases of blatant discrepancy.

After article 15 the different types of crimes against the peace and security of mankind are listed. It is our view that these should be grouped in a separate part. We propose that articles 1-14 be grouped in a chapter entitled "General provisions", while the remaining articles should be included in another chapter, "Crimes against the peace and security of mankind".

We propose that where the person who committed the crime has been defined as "leader or organizer" (namely, articles 15, 16, 17, 18, 20), this should be considered as an aggravating circumstance, as well as the fact that an individual has taken part in a group or organized form of committing a certain type of crime, considering the aforementioned arguments. These qualifying circumstances should be considered when determining the type and size of the penalty for a certain crime.

Paragraph 3 of article 17 should be reproduced as it is in article 16, too, since in both cases acts committed with the purpose of protecting the right of a nation to self-determination should not be included in the scope of the Code.

We propose that in article 21 the expression "persecution on social, political, racial, religious or cultural grounds" be supplemented by the expression "including inhuman and degrading treatment based on such grounds".

During the consideration of the proposed draft Code of Crimes against the Peace and Security of Mankind, it should be stressed by the participating Bulgarian representatives that under the Constitution international agreements which have come into force in our country become a part of our internal law. On the other hand, however, pursuant to Decision 7 of the Constitutional Court of the Republic of Bulgaria regarding constitutional case No. 6/1992, it is assumed that "for acts, which are considered criminal under international agreements, to be included in the internal law, it is necessary to specify the

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qualifying elements of and the respective penalty for each crime in an internal statute, whose force is determined in pursuance of the requirements of the internal law". In other words, for individuals who have committed crimes under the Code, to be prosecuted, it is necessary that the respective crimes, defined in the Code, be included in our internal law, and a penalty for each one of them be specified.

COSTA RICA

[Original: Spanish]

[6 January 1993]

Brief explanation of the analysis of the draft articles

The following analysis of the draft Code of Crimes against the Peace and Security of Mankind deals not only with the draft itself but also with the commentaries provided by the Drafting Committee after each article. We considered it important to take the commentaries into account since they are meant to complement the articles and give an indication of the doctrinal trends upon which they are based. Any analysis of the draft would be incomplete if it did not take account of the commentaries by its authors.

We have endeavoured where possible to consider the text article by article, dealing with each major section or part separately. We have taken this approach in order to facilitate consideration of the report and aid comprehension of the original draft, thus clarifying objections in that respect and potential ways of overcoming problems relating to legality and constitutionality to which the original draft may give rise.

We have tried to provide information on major features of constitutional and criminal review practice so that the Commission may take note of the precedents in question and assess them. This should help the Commission make headway on issues relating to the draft that are the subject of negotiations among various countries, including Costa Rica, which is beginning to engage in a renewed constitutional interpretation of criminal law and is particularly concerned that the draft should be compatible with its Constitution.

1. General part of the draft

(a) Definition and characterization of crimes (draft articles 1 and 2)

In our view, draft article 1 opts for a rather unusual definition of perpetrators of crimes against the peace and security of mankind. Such characterization takes account of a number of features unanimously regarded as elements of the serious acts that are to be prohibited by means of a description as crimes.

There is unanimity on the "cruelty", "monstrousness" and "barbarity" that may be involved in the perpetration of punishable acts such as those dealt with in the draft. These are acts that result in victims among peoples, populations and ethnic groups. As the commentary indicates, "it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind, which is characterized by its degree of horror and barbarity, and undermines the foundations of human society". 1/

In general, it can be agreed that the acts in question are extraordinarily serious and that account must be taken of their effect on potential victims. Above and beyond the protection of the rights of the individual, what is at issue is the protection of juridical interests relating to the majority of a people, ethnic group or race. The violation of these interests may involve a crime of a massive and systematic nature, as recognized by the draft; but that should not lead to the explicit conclusion that the Commission appears to be drawing: that "guilty intent" must always be presumed and "need not be proved", that such intent follows "objectively" from the acts themselves and there is therefore no need to inquire "whether the perpetrator was conscious of a criminal intent". 2/ The Commission is accepting that there is strict liability for crimes against the peace and security of mankind, an issue thought to have been settled many years ago through criminal law based on guarantees.

Strict liability is no longer accepted in any liberal system of criminal law, since it requires that responsibility be established without any assessment of the individual perpetrator's intent when he committed the crime, it being sufficient for punishment of the act that he accepted the risk of a given outcome or the possibility that his act would result in the violation of a juridical interest. Most States subject to the rule of law, including Costa Rica, decided not to accept strict liability in their criminal law. They opted instead for individual responsibility based on whether the individual concerned showed wilfulness (dolus) or negligence (culpa) in committing the act in question. Under legal systems such as Costa Rica's, punishable acts are presumed to be wilful, unless otherwise stated, in which case the legislator usually describes the act as culpable. However, wilfulness is not presumed on the basis of the individual's act; it must be demonstrated, in order to prove the existence of the individual element required for the characterization decision that is one of the initial steps taken in the judicial examination of a criminal case.

1/ Draft articles on the draft Code of Crimes against the Peace and Security of Mankind, with commentaries thereto, adopted by the International Commission on first reading, at its forty-third session, held from 29 April to 19 July 1991.

2/ Ibid., pp. 2-3.

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The issue of wilfulness arises in the typical judicial examination. It is of enormous importance, not only because it concerns characterization itself (since wilfulness is regarded as a component of the description) but also because it must be demonstrated that wilfulness exists. It is thus necessary to establish whether in the specific case in question there has been a characterization error. If there has indeed been such an error, wilfulness does not apply and (if there is a parallel description based on the concept of negligence) the act in question is punished as culpable negligence (article 34 of the Costa Rican Penal Code). In Costa Rican criminal law, it has been established that the issue of wilfulness does not depend on the degree of culpability but on characterization and that the judge must therefore pay particular attention to the problems that normally surround the phenomenon of intent (will and knowledge).

The Constitutional Court, the highest court with the competence to interpret the Constitution, has established that the guarantees laid down in article 39 of the Costa Rican Constitution of 1949 prohibit strict liability in criminal matters. Any description with the purpose of attributing responsibility to the perpetrator that presumes him guilty, in view of the risk his act entailed or the predictability of its outcome, of wilfully producing that outcome is therefore clearly unconstitutional.

Costa Rica consequently believes that there could be not only legal but also constitutional incompatibility with a description of strict liability in the draft, and that individual responsibility should be adopted for that reason. Individual responsibility is much more coherent from the viewpoint of the Commission's goal, since it is entirely in keeping with the desire to apply the Code to individuals and not to States.

Moreover, with regard to draft article 2, it is important to indicate that, although for the purposes of characterization there is no need to take account of whether or not the act in question is covered by internal law, constitutional prohibitions against legislative work on constructions of criminal acts are a matter of special concern. As already indicated, in Costa Rica a particularly noteworthy prohibition of this type is the prohibition against characterizations of criminal acts that do not protect specific juridical interests and against characterizations of criminal acts for the purpose of imposing a punishment on the basis of the principle of strict liability. The Drafting Committee must pay due regard to such prohibitions; including in the draft articles principles that constitute exceptions to guarantees relating to criminal matters set forth in national constitutions could give rise to serious problems regarding practical application if it eventually becomes international law.

Article 2 gives rise to another problem that is a matter of great concern to Costa Rica. We therefore feel obliged to suggest that it be redrafted. The sentence in question reads: "The fact that an act or omission is or is not punishable under internal law does not affect this characterization." Firstly, we wish to point out that the words "this characterization" specifically refer to the articles on crimes against the peace and security of mankind; this gives rise to the following two potential interpretations: that if there are parallel descriptions (one under internal law and another similar one under the Code of Crimes against the Peace and Security of Mankind), the description laid down under international law must be applied; or, failing that interpretation, that the two jurisdictions could coexist, both with full powers to investigate the case and to impose a penalty, which would mean that it would be necessary to accept the possibility of prosecution twice for the same deed. Secondly, we believe that the sentence should be deleted because it would necessitate clarification of potential jurisdictional problems arising as a consequence of the first problem, particularly as regards rules on statutory limitations and procedural and substantive guarantees that would lead to the application of international rules of law.

The problems in the first category are insoluble, because the constitutions of most Latin American countries, including Costa Rica, prohibit punishment twice for the same act, which is what would happen if the appropriate penalty were applied first under internal law and then under international law. With regard to the second category of problems, there is much to be gained from not embarking on definitions of the jurisdictional principles requiring implementation of the draft; among other things, there is the difficulty that would arise in a situation where the State that arrests the alleged perpetrator is a party to the Code of Crimes but - in keeping with the principle of arrest - applies its own criminal laws and not the provisions of the Code, even though another principle (universality or territoriality) calls for application of the rules laid down in the draft. We are aware that the Commission's aim was to avoid the latter problem, but we believe that the current drafting would present all these disadvantages, which can easily be avoided through the deletion of the relevant sentence. 3/

2. General principles (articles 3-14)

(a) Responsibility and punishment (article 3)

In view of our conclusions on the issue of individual responsibility, we believe it is necessary to include an article dealing with the principle of legality in connection with the acts under consideration, particularly a definition of one of the most important related principles: the principle of culpability.

Paragraph 1 of article 3, which is poorly worded, should also cover responsibility on the grounds of wilfulness, negligence or preterintention. It should do so not only as a matter of general principle but also in order to dispel any idea that there might be such a thing as punishment in accordance with the principle of strict liability, which is a "sword of Damocles" hanging over the draft, threatening its potential success.

3/ Some members of the Drafting Committee appear to have been in favour of deleting the second sentence in article 2, which they did not consider strictly necessary. We regard their objection as justified.

Paragraph 2 deals with complicity, conspiracy and incitation, all at once - a rather questionable approach. We suggest that a separate section be drafted on perpetration and participation, covering the most recent relevant principles. Conspiracy should be left out, since the corresponding penalty would be a punishment for ideas or decisions that took shape but did not materialize as an effective threat to a juridical interest protected under penal legislation. The concept of conspiracy often arises in Anglo-American law but is unknown in the law derived from Continental Europe. We therefore believe there will be difficulties regarding its adoption by the Latin American countries, owing to highly justified reservations based on recent democratic achievements that are a reaction to certain de facto Governments and whose purpose is to counter any possible pretext for the punishment of individuals with different views. Latin America has had experience with dictatorial regimes, which make a practice of using the terms "conspiracy" and "criminal association" in order to punish individuals with different views and thus punish dissidents and acts directed against the regime, even though such acts constitute no more than the exercise of an individual freedom already directly curtailed through the exercise of authoritarian power.

With regard to the issue of the responsibility of the State and the commission of the punishable acts described under the draft Code, it must be stressed that if the principle of individual responsibility is taken as a basis it is necessary to punish State agents who have committed the acts described in the draft either personally or indirectly or in complicity with other perpetrators. In such a case, the responsiblity of States would be limited, in the event of offences committed by State organs, to joint and several liability for damages. We believe that the members of the Commission are right in indicating that the potential responsibility of States as perpetrators of the acts in question would lead to a transformation of the principles underlying the punishment of the acts on account of individual responsibility, and would oblige the drafters to move closer to the type of principles relating to penal matters that are being developed for the punishment of crimes perpetrated by transnationals, whose representatives are answerable, like those of States, in accordance with a set of laws and principles to be reviewed in the light of each particular country's constitution.

With regard to such specific acts as helping perpetrators get away and eliminating the instruments or proceeds of the crime, the acts in question should be specifically described as crimes and not be left to be construed merely as a form of complicity; such an approach is in keeping with the principle of legality and facilitates evidentiary tasks. Clearly, those who commit such acts with a view to helping perpetrators of crimes against humanity get away are not participating in the principal act, but they are taking part in these acts of "concealment" and it is for these crimes that they must be punished.

We have no comments to make on paragraph 3 - which deals with attempt and contains a definition that is quite in keeping with the internal legislation of most States - except that we should like to point out that it is unnecessary to specify which articles define acts constituting attempt, because the acts in question must be defined on a case-by-case basis; leeway must be left for interpretation in this area, in view of the wide range of preparatory acts and forms of commission of acts involved in the definitions of the crimes dealt with in the draft.

(b) The fact that the perpetrator may not claim to have had motives other than those expressly referred to in the description of the relevant act (article 4)

It is understandable that the Drafting Committee should believe that nothing can justify a crime against the peace and security of mankind; however, as we have already indicated, the principle of strict liability cannot be used if there is no requirement regarding the perpetrator's intent and knowledge and if there is no opportunity to take account of motives that might indicate that an error of characterization or prohibition has been made in the judicial study or analysis of the matter.

While it is true that the judge may not take into account trivial or inadmissible motives in order to justify or attempt to lessen the responsibility for a given act, it is also true that one of the most modern and advanced manifestations of respect for human dignity is considering and promoting the rights of the defence. These rights do not arise only in a formal context but also in a practical context, where use is made of all available regular and special judicial remedies and where the accused is presumed innocent and continues to be so presumed, since the investigating body must put forward arguments on the basis of a series of facts and circumstances with a view to proving his culpability beyond all reasonable doubt. It is true that the juridical interests that are to be protected by the laws under consideration are very extensive, but that is no reason to ignore the fact that respect for justice begins with respect for the accused. It is therefore absolutely essential not to prevent the defence from finding solutions but instead to pave the way for solutions and ensure that the penalty ultimately imposed does not reflect the degree of immorality of an act but is an assessment of a crime of which an individual is guilty.

(c) Responsibility of States (article 5)

Provided that the international responsibility of States is referred to in the terms used in the relevant doctrine under international law, Costa Rica endorses the current wording of the article. However, note should be taken of our earlier reference to the civil liability of the State, which is jointly and severally liable for damages in connection with the crimes under consideration.

(d) Obligation to try or extradite (article 6)

These extradition rules must undoubtedly be reconciled with the United Nations rules on the subject (the Model Treaty on Extradition). Of grave concern are the theories which are currently being developed with regard to international courts being composed of judges of varying backgrounds and jurisprudence. This is of concern because such a composition could affect the rights of the defence in view of the uncertainty as to whether rules of interpretation would be utilized to define aspects of the crime of which the individual concerned would later be accused. In this connection, it is recommended that it be national courts which try criminal acts or extradite in accordance with a multilateral treaty on extradition which takes into account the most up-to-date systems for protecting the rights of the accused, while also offering minimum guarantees for the prosecution of crimes.

Special care should be taken in the formulation of global policies with regard to interpolice cooperation and the joint support of all justice systems for the handing over of prisoners, an area in which the first steps have barely been taken.

The issue of an international criminal court is problematic in and of itself, not only because of the possible types of jurisdiction which may be conferred on it, but also because of the need felt by all States to ensure that their nationals are afforded all the judicial guarantees already established and provided by their internal law. Costa Rica is a special case in this regard since, while the extradition of aliens is permitted, the extradition of nationals is prohibited and, in the final analysis, Costa Rica is constitutionally incapable of allowing one of its nationals to be compelled to leave the country in order to be tried by a body such as the one which it is proposed to establish. However, the main problems do not stem solely from these types of principles concerning extradition, since the discussion which will always be on the agenda will have to do with the guarantees afforded to the accused, the characterization of conduct constituting a crime and the penalties imposed for criminal acts, in addition to the measures by which the internal law of each State ensures the implementation of the principle of universal justice, an aspect which would directly affect the exercise by this international court of its jurisdiction.

Without prejudging the issue, since the characteristics of this international court have not yet been defined, we believe that it could be declared unconstitutional under the Costa Rican Constitution.

(e) Non-applicability of statutory limitations (article 7)

It is true that the issue of statutory limitations is one of policy regarding crime, and that States do not follow uniform rules in this respect; nevertheless, it has recently been held that statutory limitation more properly refers to the State's real power to prosecute citizens, which ultimately cannot be an unlimited option to prosecute; if the State fails or is unable to try an individual within a given period, this option should expire in the individual's favour. We are, of course, aware that the monstrousness of these types of crimes would "morally" justify the non-applicability of statutory limitations; however, the contemporary legal trend is towards short statutory-limitation periods and a penal process which includes guarantees but is swift. Thus, there will probably be major negotiating problems in this area.

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What would perhaps be most appropriate would be to establish a statutory-limitation period to be negotiated with countries on the basis of the longest such limitation periods for ordinary crimes in internal law, which currently range up to 20 years and more, a period which is more than sufficient for a timely response by the penal system; a longer period would imply that the punishment imposed, and the process which is established for its imposition, would be incapable of having general or special preventive effects.

(f) Judicial guarantees (article 8)

It is appropriate to think about the principles deriving from due process which should be applied to these types of criminal matters. The Constitutional Court of Costa Rica, in its judgement No. 1739-92, has broadly defined these principles and aspects and has incorporated all those which are mentioned in article 8. It would indeed be advisable to bear in mind that the rules for the conduct of trials remain to be defined; they could be set out in an annex to the Code, which would serve as an interpretative instrument. In the Latin American context, the American Convention on Human Rights establishes a number of judicial and penal guarantees which apply to any type of trial; in Costa Rica, even if this article 8 did not exist, the Convention and the constitutional rules of due process would be applied (articles 39 and 41 of the Costa Rican Constitution).

(g) Non bis in idem (article 9)

Paragraph 1 of this article prejudges the question of the establishment of an international criminal court; however, we should construe it as referring to the national court which, in accordance with the principle of arrest or universal justice, imposes a punishment for the act committed by the individual, leaving aside not only the possible jurisdiction of the national court, but also the possible violation of the non bis in idem rule which could be involved and which would constitute a violation of the procedural rights of the accused.

Paragraph 2 should be eliminated, because to limit the possibility of the penalty being implemented in a manner more favourable to a person accused of this type of offence would necessarily violate the principle of equality; a well-drafted paragraph 1, giving national courts full jurisdiction to try persons accused of such acts, would be sufficient.

Paragraph 3 directly violates the non bis in idem principle and should be deleted in order to avoid the constitutional violations which it implies.

Paragraph 4 admits the principle of arrest and universal justice, which is the basis for the operation of the current jurisdiction of countries with regard to this type of offence (article 7 of the Costa Rican Penal Code).

Paragraph 5 should also be eliminated, since it allows for a second conviction for the same acts which resulted in a judgement being handed down for an ordinary crime.

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(h) Non-retroactivity (article 10)

The principle of non-retroactivity is well defined and operates in full accordance with the constitutional definitions of the subject.

(i) Order of a Government or a superior (article 11)

It would appear that what is at issue here is the set of rules which have been treated in the majority of Latin American penal codes as referring to "non-culpability", although it has been agreed in recent times that they do not all refer to issues of culpability, but that questions relating to characterization and justification might be involved.

In the case of article 11, we are told that the possibility of punishment arises only where an order which is blatantly illegal or in violation of human rights has been carried out by an agent of the State who is a subordinate. In this connection, we think that not only military regimes (which use the chain-of-command system), but also other ordinary-law penal systems are continuing to use the chain-of-command system; accordingly, its wide use in this draft is to be recommended. The chain-of-command scheme which is outlined in the draft penal code for Spain (1992) can be used as a model.

One additional argument in support of the notion that chain-of-command rules should be adopted in full is the existence of article 12 on the responsibility of the superior, which implies the possible existence of errors of characterization and prohibition applicable, through interpretation, to the cases mentioned in article 11.

(j) Official position and responsibility (article 13)

All systems of immunities appear to be excluded by this article; however, account should be taken, as a rule of penal procedure, of the various cases in which these types of government officials can be prosecuted, rather than leaving it as a rule in principle which, as such, could be inapplicable.

(k) Defences and extenuating circumstances (article 14)

If a more technical formulation of the need for judges to evaluate such circumstances is desired, it is necessary to draft a generic rule concerning the aspects which should be taken into account for the assessment of blame, as is done in article 71 of the Costa Rican Penal Code. In any case, even though this article takes many defences and extenuating circumstances into account for this purpose, while penal characterizations can take into account the existence of qualifying aspects which influence the extent of the penalty, on the basis of the same indictment, thereby reducing the extent of the judge's discretion, it is a decision relating to policy regarding crime which should be evaluated.

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3. Special part of the draft

(a) Aspects of legality of the descriptions

(i) Principle of legality and characterization

The principle of legality of the crime, as enunciated in the universal maxim "nullum crimen, nulla poena sine praevia lege" (which follows Feuerbach's Latin construction), and as represented in the Latin American countries (article 1 of the Penal Code of Brazil, article 39 of the Constitution of Costa Rica, and article 2, paragraph 20 (d), of the Constitution of Peru), has been espoused as a principle by various peoples at various points in time, and has likewise been fiercely contested by persons and groups that assume the exercise of power to be a form of unilateral supremacy maintained by force, rather than a way of guiding a nation towards a common goal by means of participatory democracy. The common embryo in all the struggles on behalf of that principle of legality is the opposition to arbitrariness in penal and correctional justice. This opposition marked the birth of what we can today call modern penal and correctional law, described as being liberal and democratic in so far as it impresses on the State authorities the need to identify to citizens in advance those acts that are punishable, those acts that are to be prohibited. Prohibition should be justified on grounds of necessity. The acts are to be prohibited because of the serious risk they would pose to organized coexistence. Such an act, however, can be punishable only if the legislature determined, before it was committed, that it should be punishable. Thus, accepting the principle of legality of the crime means having a very clear-cut division between the authority adopting legislation and establishing the prohibition, and the judicial authority. The latter's duty is to pronounce on the question of culpability and, on that basis, to impose the penalty.

With the principle of legality, there emerges a penal and correctional law whose fundamental thesis is that only legislation is empowered to determine the existence of crimes and offences, and establish the respective penalties - by way of tackling arbitrariness in judicial proceedings.

In historical terms, the evidence of such arbitrariness lies primarily in the lack of limits for the exercise of functions by judges, which gave the judicial authority the power to legislate, by making it the judge's duty to determine, in the final analysis, what was prohibited. Each judge thus became a de facto legislative authority. One should note the major risk that such a situation creates: the role of judicial interpretation is expanded from an exercise involving the identification of the framework to one involving decisions as to whether the actions of an individual should or should not be punishable. Thus the judge's shortcomings, prejudices, beliefs, opinions or fears can find a larger and easier outlet.

As they gain currency in a juridical regime, the principle of legality of the crime and its natural derivative - the characterization of the act to be punished - create a particular category of penal and correctional jurisprudence, based on respect for the human right of every inhabitant to know beforehand what areas of prohibition limit his acts as a subject in society.

Through this system, the legislator, who is always the temporary holder of a power that is vested in the people, as may be seen from many constitutional texts, is obliged to place in the judge's hands clearly defined models of conduct, so that in seeking to determine whether an act has the specified characteristics, he would know for certain which prohibitions the legislative authority wanted to impose. Such a legislative attitude is of paramount importance in legal systems where the legislator must start with real situations in describing models of conduct (clear models, with precise limits, avoiding unnecessary detail as far as possible), and in establishing rational prohibitions that are always related to juridical interests requiring protection in penal and correctional matters.

(b) Principle of legality - problems of characterization in the draft

In the light of the observations in the preceding paragraphs, it must be made clear that within a republican framework, the principle of legality of the crime cannot be viewed in isolation from what we might call its natural derivative: the characterization of the act identified as a penal or correctional matter. Without the characterization as an essential corollary, the principle of legality would remain a mere postulate - and an incomplete one - for the existence of imprecise or obscure penal or correctional texts would give the judge the power to become a legislator by obliging him to identify the characteristics of the act and interpret the limits or scope of the law. On the other hand, the existence of the principle of legality suggests the existence of republican penal law, for not only is characterization of the act necessary (clear, precise and well-defined description), but, in addition, the existence of the principle makes it possible to predict the existence of a system of punishment based on juridical interests. We should like to stress that each and every one of the prohibitions covered by penal provisions should be established on a rational and reasonable basis: the protection of elements of paramount importance for coexistence in society.

One must therefore be mindful of the fact that the reference to "nullum crimen, nulla poena sine lege" is a reference to much more than a mere constitutional or legislative postulate; it is a reference to the adoption of a particular attitude towards the system of punishment, meaning that the State has a legislature that is distinct and separate from the judiciary and that the legislature not only has an obligation to describe in a clear, precise and well-defined manner the acts to be prohibited, but should prohibit only acts affecting interests that are essential to coexistence.

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(c) Violations of legality and characterization

Two methods of violating the postulates on which we have been commenting have been systematized doctrinally; however, other methods of disregarding the existence of guarantees of legality and characterization can be found in the legislative and judicial practice of countries. Before going into them, we should point out that in police practice and other extrajudicial practice, many methods and examples of violation of these principles can be found.

A. Penal laws with blank spaces, or legislative references, a common legislative practice in our countries, which consists of referring, in part of the description of the act, to other laws, whether penal or extrapenal, of equal, greater or lesser force than penal laws. It is logical to assume that where reference is made to regulations, decrees, ordinances or other provisions of lesser force than law, that amounts to a total and absolutely clear violation of the principle of legality, since the text referred to would be amended by executive, rather than legislative, order, which means that a penal text could be totally remodelled by the decreee, regulation, ordinance or other executive provision referred to. Where reference is made to laws of equal or greater force, the problem would appear to be less serious, although from a technical and descriptive point of view, it is equally improper, since an analysis of the description would require consultation of the law or laws referred to.

The foregoing shows that there are, so to speak, gradations in references, which range from those in absolute violation of the postulates of legality (references to texts which can be remodelled outside the purview of the legislative authority) to those where the text referred to belongs to the same corpus of law as the text in which the reference occurs, in which case both can be analysed easily. Lastly, mention should be made of those cases in which the text refers to another legislative provision, but in such general terms that consultation of that provision becomes difficult: "Anyone who, in accordance with law, illegally exercises ...".

It should be noted that, in such cases, characterization requires consultation of all legislation for the purpose of identifying and incorporating the characteristic treatment and, ultimately, the prohibited act. Accordingly, texts with references or penal laws with blank spaces constitute the boundaries beyond which correctional descriptions can be regarded as violating the dual requirements of legality and characterization (article 15 on aggression is undoubtedly an example of this).

B. Open characterizations (which in our view go beyond a simple legislative method of violating the requirement of characterization, to the point of becoming genuine denials of the principle of legality and clear aberrations from the standpoint of a democratic and republican law on suppression and punishment) can be defined, on a working basis, as those descriptions of an act identified as a penal or corrrectional matter which do not represent precise or clear limits on the scope of the prohibition and, accordingly, do not enable the judge or the citizen to have a positive and unequivocal knowledge of the prohibition.

Such descriptions are considered to be obscure, imprecise or without clear limits where the legislator, in drafting them, uses ambiguous or polysemous terms, poor syntax in the composition of the text or an excess of elements open to interpretation, so that there are no clear indicators which enable the citizen and the judge to know the extent of the prohibition. Thus, the judge finds it necessary to interpret the scope of the prohibition, thereby assuming legislative functions: if there is no limit, the judicial act of determining whether an act has the specified characteristics (incorporation) becomes a typical legislative act, with the further difficulty that there will be as many legislative acts, establishing prohibitions, as there are persons with different points of view performing judicial functions and applying open characterizations (article 20 is a case in point).

C. Normative elements, which are one of the causes of openness in characterizations, deserve special mention, although the question of legality remains clear: if they require interpretation, the principle of legality of the crime has been violated.

Although the definition of normative elements which the various authors have given may not be very obvious, the works consulted were unanimous in stating that normative elements are subject to interpretation. Mayer is the first to have used such a term, according to Jiménez de Asúa; he used it to designate the components of a penal description: "... which have only a given evaluative importance ...". Normative elements are not in the same position as the subject, modal or temporal auxiliaries, and so on, which have a place and a given function in the characterization: normative elements can be any word, with any function (subject, nucleus) and with a value, they are value-laden terms (or they confer value on the terms used). Or better still: terms which the legislator leaves undefined, without giving them a clear meaning and which, accordingly, will need to be evaluated by the judge. Morality, acceptable conduct, authentic instruments and many more examples in the three legislations analysed.

When the term for which no definition is given refers to the legal order (juridical normative elements) the problem does not generally arise, since the term will have been defined by the legal order itself or by custom; the meaning is unambiguous: public instrument, spouse, etc.

Unlike juridical elements, the so-called cultural normative elements refer to relationships, cultural patterns, social beliefs, group preferences and so forth. This is where problems arise from the standpoint of legality/characterization. In one of the legislations we have studied (article 291 of the Penal Code of Costa Rica) there is a characterization which concerns anyone who engages in witchcraft, sorcery or "... any other act that is contrary to civilization and acceptable conduct". From the above text it appears that no further explanation is needed; that is also the problem with article 24 relating to terrorism.

(d) Juridical interests and the draft articles

The characterizations given in the draft articles like the penal characterizations given in internal law, are descriptions which set forth a normative model in the form of an affirmation. This means that, beyond the characterization (whether it be correctional or penal) there is always an understanding of how things ought to be. This is purely a matter of style. However, when the correctional description refers to the normative model elliptically rather than expressly, there is a danger that we may forget that such a model exists. This is dangerous because we may end up believing that the law is the law, pure and simple, and forget that the norm, which is what all characterizations reflect, is a rational imperative whose purpose is to protect. In other words, there is a reason for the penal norm, a rationality and reasonableness which reaches beyond the mere exposition of the norm to its essence: juridical interest. The purpose of any prohibition covered by a penal or correctional provision is to protect.

Thus, just as we say that there is no crime unless there has been a violation or endangerment of an interest protected by the penal law, so we must point out that the same applies in respect of correctional norms.

According to the republican approach to punishment, there is a rational basis for the prohibitions against acts which are punishable by law; this prevents the legislator from prohibiting an act without understanding the need for, and the rationality of, the prohibitions. Thus the existence of juridical interests is a direct derivative of the political form of life which these nations have chosen. Accordingly, the tenet that there is no crime unless there has been a violation or at least a real threat to the juridical interest which is protected by the penal law has absolute validity in our constitutional systems and is the essential basis of this study.

Thus we start from the assumption that any correctional characterization or description demonstrates and presupposes the existence of a juridical interest, and it therefore follows that, in addition to being clear, precise and well-defined, characterizations must refer to the protection of juridical interests which are reasonable in accordance with the group's social purpose.

The juridical interest arises from the need for coexistence. A characterization protecting any area of life the need for which is not felt by the entire group is an unreasonable social prohibition; although mandatory, since it is a law, its existence is not justified in a State having a republican-democratic form of life. Accordingly, there is a complementary relationship between juridical interests that are protected by the penal law and fundamental social needs (of all), since the only acts worthy of being raised to the category of interests protected by penal norms are those individual acts which truly disturb and threaten the life of the group as a collection of human beings (in all their diversity) seeking a common goal.

(e) Fragmentary character of the prohibition

It is often stated that penal law is fragmentary in character or that penal law is a discontinuous system of illegalities. This is true; however,

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penal law (in the strict sense, namely, that of crimes proper) does not constitute the whole of the law as a system of punishment subject to legality; although there is no question as to the ontic equality between crimes and violations (what is questionable is the various police, procedural and penitentiary practices), it is necessary to affirm that international penal law also is fragmentary in character.

Allow us to digress a moment on this subject: it is not penal law or international penal law that is fragmentary but the common source from which these laws spring: penal law as a system of punishment subject to legality, norms with penalties (penal or international).

When we speak of the fragmentary character of these laws we are referring to the idea that only those areas requiring real protection need to be covered by penal provisions, as opposed to the common practice used by Latin American penal norms to regulate areas which owing to their importance or their very substance would fall within other branches of the law.

(f) Brief synthesis of the problems of legality involved

Generally speaking, we believe that the penal characterizations of the draft articles should be redrafted: the descriptions should be made clearer; the normative elements and blank penal laws should be reduced; and the characterizations should protect specific juridical interests.

This revision is extremely important if we wish successfully to negotiate penal characterizations. We have stated the above considerations in order that the Commission may take these doctrinal aspects into account in its final drafting of the draft articles. In Costa Rica this is already part of constitutional doctrine and we would be compelled to reject the draft articles because of the above-mentioned problems which are present in them in great measure.

DENMARK

[See Norway]

ECUADOR

[Original: Spanish]

[7 May 1992]

The title of the code might lead people to believe that it is simply a catalogue of crimes. It would be better to call it "Penal Code for Crimes against the Peace and Security of Mankind" or "Code of Penalties for Crimes against the Peace and Security of Mankind", as suggested by the writer Jiménez de Azúa.

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Article 1. With a view to strengthening its content, it would be worthwhile adding a paragraph which would read as follows:

> "The following, inter alia, shall be considered criminal acts under international law: genocide, terrorism, aggression and illicit traffic in narcotic drugs."

Article 17. It would be better to speak of "militaristic intervention" or "armed intervention", since there are other types of intervention, for example, economic.

Article 19, paragraph 2 (d). This should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

FINLAND

[See Norway]

GREECE

[Original: French]

[3 February 1993]

The Hellenic Government should like, first, to congratulate the International Law Commission for having adopted the draft articles in first reading. It should also like to thank the Special Rapporteur, Mr. Doudou Thiam, for his important contribution to the preparation of the draft.

The Hellenic Government views completion of the first reading of the draft articles by the Commission as a particularly positive development.

With regard to draft articles 15 to 26, the Commission had identified 12 crimes which are of a particularly serious nature and which constitute an affront to mankind. The Hellenic Government supports the inclusion of all these crimes in the Code. However, it would be desirable for some of the provisions, inter alia, those of article 22, paragraph 2 (a), to be made clearer.

Furthermore, it would be a good idea to include, after the threat of aggression (article 16) and aggression (article 15), a characterization relating to unlawful occupation, annexation and succession of a State by adopting a new provision which could read as follows:

> "Deliberate failure to respect the mandatory decisions of the Security Council, designed to put an end to an act of aggression and to wipe out its unlawful consequences, is a crime against the peace."

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ICELAND

[See Norway]

NETHERLANDS

[Original: English]

[18 February 1993]

Part I of the present commentary sets out the views of the Netherlands Government concerning the legal status of the draft Code and ways of linking it to a mechanism, yet to be developed, which will enable the Code to be enforced under the provisions of international criminal law. Part I also concerns the main features of a mechanism of this nature.

Part II sets out the views of the Netherlands Government on individual articles of the ILC draft Code.

First, however, the Government wishes to comment briefly on the background to and significance of the draft. The preparations for the Code and the question of whether or not an international criminal court would be desirable have a long history. The General Assembly of the United Nations requested the ILC to prepare a Code of crimes against the peace and security of mankind in 1947. The project was delayed, however, partly due to the prolonged debate that ensued concerning the definition of aggression. The Netherlands Government applauds the fact that the ILC, notwithstanding such obstacles, was able to complete the first draft of the Code in 1991.

Although the ILC has considered both the desirability of establishing an international criminal court and the possibility of doing so, there are no provisions on this subject in the present draft of the Code. However, the ILC report includes a list of factors relevant to the matter, for which provision would need to be made.

The Netherlands Government made its views known on the desirability of establishing an international criminal court during the review of the ILC report by the Sixth Committee in the autumn of 1991. The Government's views on the matter are therefore set out fairly briefly in part II, in so far as it relates to the Code.

I. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Legal status

In the opinion of the Netherlands Government, the aim of this Code is to designate certain offences as crimes against the peace and security of mankind and to set up an enforcement system (whether national or international)

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applying only to those offences. This requires that the offences in question be defined as clearly as possible and laid down by treaty. This is in any event required in connection with the principle of "*nullum delictum sine lege*". This basic premise is reinforced by the fact that an international enforcement system involving the establishment of an international criminal court is under consideration.

For practical reasons, however, the following comments are formulated in the terms used by the ILC.

Scope of the Code

The Netherlands Government notes that there are substantial discrepancies in the nature of the offences referred to in the Code. Moreover, the choice is fairly arbitrary and includes a wide range of offences. On the one hand, it includes offences which run contrary to society's sense of right and wrong and constitute mass violations of basic humanitarian principles. These are offences which in any event are punishable under prevailing international law and for which individuals can be held liable. They include genocide, for instance, or serious war crimes. On the other hand, certain offences included in the draft Code, which are based on obscure or in any event unspecified criteria, are mainly a reflection of the types of international crime besetting various countries at the present time. Traffic in drugs is an example.

In the view of the Netherlands Government, there should be a close relationship between the offences to be considered for inclusion in the Code and the anticipated enforcement system. Since the Code envisages a universally applicable international enforcement system, certain criteria should apply to the offences to be covered by the Code. Considering that States are generally reluctant to relinquish any of their powers, especially in the fields of criminal law and the enforcement of criminal law, it should be assumed, for the time being at least, that it will be possible only in exceptional cases to effectuate any form of international enforcement.

In the opinion of the Netherlands Government, a universal system for the enforcement of criminal law would be possible and desirable only in respect of offences that satisfy the follwing criteria:

(a) Crimes that violate fundamental humanitarian principles endorsed by the world community and outrage the conscience of mankind;

(b) Crimes which by their very nature are likely to preclude the effective administration of justice at the national level, and in respect of which justice can only be properly dispensed at international level;

(c) Crimes for which an individual can be held personally responsible, regardless of whether or not he or she was acting in a public capacity.

Having regard to these criteria, the Netherlands Government is of the opinion that the Code should cover only the crimes of aggression, genocide, systematic or mass violations of human rights, and serious war crimes.

These crimes are in any event punishable either on the grounds of international treaties or in accordance with international customary law. The Geneva Conventions of 1949 and the Additional Protocol I of 1977, as well as the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948, may be cited in this context.

Nevertheless, the Netherlands Government considers it feasible that at some point in the future, once a Code and criminal court are in place, other crimes (and possibly crimes of a different nature) may, if necessary, be included in the Code. However, this could only be achieved if the present structure of national sovereign States opens up to include an international mechanism for the enforcement of criminal law.

For the record, the Netherlands Government emphasizes that its view that relatively few crimes should actually be included in the Code does not imply that the additional crimes specified by the ILC should not be punishable. The list advocated by the Netherlands should not be taken to mean anything other than that the crimes omitted from the proposed list do not satisfy the criteria set out above, which have been formulated specifically with a view to producing a Code linked to an international enforcement mechanism. The crimes not included on the list, like the majority of those mentioned by the ILC, should perhaps be provided for by individual treaty and on the grounds of the "aut judicare, aut dedere" principle or the principle of universality. In cases of this nature, enforcement would ultimately take place at national level.

Linking of the Code and enforcement system

The Netherlands Government considers it important that the Code be closely linked to a system of enforcing it. In this connection, it observes that the development of international law based on the Code will primarily concern ways of enforcing the Code internationally, rather than making certain crimes punishable; all the offences to be included in the Code are in any event punishable under existing treaties or customary law. The main objective is therefore to develop a viable international enforcement mechanism. With this in mind, it would be advisable for the time being at least to limit the number of crimes included in the Code and thus minimize any breach of the national jurisdiction of States. In the light of the foregoing, the Netherlands Government is not in favour of a Code which makes provision for certain crimes but fails to create an enforcement mechanism. In this case, it would serve little purpose.

Finally, linking the crimes listed in the Code with a system of enforcement implies that no exemption clauses may be included. The crimes which the Netherlands Government would advocate for inclusion are already punishable under international law, while exemption clauses in respect of the enforcement mechanism would be undesirable, since they would undermine the essence of and the very reasons for adopting the Code.

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II. ENFORCEMENT OF THE CODE

In its contribution to the debate on the ILC report in the Sixth Committee of the General Assembly last autumn, the Netherlands Government set out in detail its views on the possibilities and desirability of creating an international criminal court. The following is therefore a summary of its views on the type of international enforcement mechanism it would like to see in place. In view of the nature of this contribution and the fact that talks concerning an international criminal court are still at an early stage, the following comments do not constitute an exhaustive analysis of the problems that could be encountered in creating a criminal court of this nature.

The following issues are dealt with consecutively:

- The competence of an international supervisory mechanism (hereinafter referred to as the criminal court);
- The procedure to be followed in the event of a criminal court of this nature being created;
- The punishments to be imposed;
- The composition of the prosecuting agency and the criminal court.

Competence of the international criminal court

Competence ratione materiae

Since the object is to achieve an enforcement system in conjunction with the Code, the powers *ratione materiae* of the international criminal court should be confined to the crimes to be specified in the Code, as suggested above.

Conferral of jurisdiction

The Netherlands Government favours a system of preferential jurisdiction. This means that the international criminal court would have competence as soon as a person was suspected of committing any of the offences included in the Code. If proceedings were not instituted before the international criminal court, the national courts would acquire or regain competence to try the suspect. However, if the case were in fact to be tried before the international criminal court, the court would give judgement at first and sole instance.

An important question here is whether or not the court should be able to try cases in the absence of the accused. Although the Netherlands Government has not yet reached a final conclusion regarding the desirability of legal proceedings by default, we would draw attention to the disadvantages of such proceedings, since actions of this type are particularly difficult and time-consuming and may have adverse effects on public opinion.

The following points are relevant to the question of when, specifically, the international criminal court would be competent to take cognizance of a case. In the first place, having regard to the criteria set out in part I of the present commentary, the issue in question concerns the hearing of offences which are in any event universally punishable. Secondly, the criminal court should be competent in respect of any person guilty of any of the crimes specified in the Code, even if that person is in a country or is the subject of a country which is not a party to the Code. In addition, it is important that States subscribing to the Code incorporate in their national legislation the principle of universality in respect of the crimes included in the Code.

The Netherlands Government would be opposed to a procedure assigning to the criminal court the role of appeal court. However, this does not preclude a procedure for hearing disputes regarding the interpretation or application of the Code in cases which are brought before national courts following a decision not to institute proceedings before the international criminal court.

Regarding prosecution of the crime of aggression, the question arises as to the relationship between the criminal court and the Security Council. The view of the Netherlands Government in this respect is that, regardless of whether or not the Security Council has debated the political question of whether a State has committed an act of aggression, the criminal court should in principle have full discretion with regard to the juridical question of whether or not an individual is guilty of that same offence. However, it is highly unusual for the Security Council to designate an act as being one of aggression, while such a pronouncement invariably has extremely far-reaching consequences. It should therefore in fact be deemed virtually impossible in practice for the international criminal court to reach a different conclusion in respect of the same situation.

In the light of these considerations, the Netherlands Government considers it unnecessary for the Security Council to be assigned a specific procedural role in prosecuting suspected acts of aggression.

Procedure

In the opinion of the Netherlands Government, a procedure should be designed which is at the very least in accordance with the principles set out in article 8 of the Code.

The establishment of a special Public Prosecutions Department would be essential in order for cases to be tried by the court. Such a Public Prosecutions Department should be able to submit applications to the court:

(a) On its own initiative, for example, if it has received information from a State;

(b) On the grounds of a resolution adopted by the General Assembly of the United Nations. If the General Assembly of the United Nations were to adopt a resolution of this nature, it should be incumbent upon the Public

Prosecutions Department to prosecute the case. The Government considers the General Assembly of the United Nations the most appropriate body in view of its wide representation and powers;

(c) On the grounds of instructions to this effect from the international criminal court. Such instructions may be given at the request of a State, should the Public Prosecutions Department decide against prosecution (expediency principle) after receiving information supplied by that State.

Punishments

Having regard to the principle of "nulla poena sine lege", the Code should incorporate provisions concerning the punishments to be imposed for these crimes. Since the Code is solely concerned with crimes of an extremely serious nature, the Netherlands feels they should all be subject to the same penalty, either in the form of custodial sentences, measures to restrict freedom or the confiscation of assets (such as those acquired through the commission of the crime). The Netherlands Government would be opposed to the inclusion of the death penalty as a punishment under the Code, which would make it impossible for many other countries to endorse the Code on the grounds of national and/or international law.

Composition of the court and prosecuting agency

Composition of the criminal court

In the view of the Netherlands Government, the criminal court should be relatively small, comprising, for example, between five and seven independent judges elected by the same procedure as members of the International Court of Justice. The criminal court should be independent of the International Court, which is in fact an entirely different type of body from the court envisaged here. However, this need not prevent judges at the International Court from being appointed to the international criminal court, nor should it preclude other forms of organizational concentration which would underline the universal character of the criminal court.

The Public Prosecutions Department

In the view of the Netherlands Government, the Public Prosecutions Department should comprise one procurator general appointed by the General Assembly of the United Nations, assisted by one or more advocates general and a small staff. In the Commission's opinion, the role of the Secretary-General of the United Nations, and especially the objectivity he is required to maintain in the exercise of duties assigned him by the Charter of the United Nations, would be incompatible with the function of formal head of the Public Prosecutions Department.

III. REVIEW OF INDIVIDUAL ARTICLES

Article 1. Definition

The Netherlands Government would prefer the phrase inserted in parentheses, "[under international law]", to be deleted. It shares the view of those members of the ILC who consider the insertion unnecessary and a potential source of confusion concerning the interpretation of the article.

Article 3. Responsibility and punishment

The Netherlands Government advocates that in principle not only the commission of a crime referred to in the Code, but also any attempt to commit such a crime, should be punishable. This could be achieved in a uniform manner either by amending article 3 to specify that an attempt to commit one of the crimes included in the Code is likewise punishable, or by reformulating each of the material provisions to include the words "attempts to commit" as well as "commits".

Secondly, the term "individual" in article 3 should be more closely defined. In particular, the article should specify whether it refers only to a natural person or whether it could also refer to a legal person. The advantage of the latter is that it would cover groups of people who cannot be deemed to be either individuals or government bodies. The drawback, however, is that this wider definition could make the enforcement system considerably more difficult to operate. In its second reading of the Code, the International Law Commission might pay closer attention to this matter either in the text of the article or in its commentary.

Thirdly, the Netherlands Government is unclear about the ILC's view of the connection between the concept of "the planning of" and the word "conspires" in article 3, paragraph 2 of the Code.

Finally, it suggests deleting the word "abets", which it considers too loosely defined and vague to merit inclusion.

Article 4. Motives

The Netherlands Government considers article 4 redundant, as the same points are covered in article 14. A reference to the purport of the present article 4 and its commentary could perhaps be made in the commentary to article 14.

Article 6. Obligation to try or extradite

Part I of the present commentary sets out the views of the Netherlands Government regarding the importance of linking the Code to an enforcement mechanism. The Government agrees with the ILC that this article will need to be amended once a decision has been taken concerning the establishment of an international criminal court. At that stage, it will probably be possible to delete parts of the article. The Netherlands Government has two further points to make in this context.

Firstly, with regard to extradition, it is essential that sufficient guarantees be provided that the suspect will be treated in accordance with the provisions of article 8 of the draft Code. This could be achieved either by adding a clause which explicitly prohibits extradition if the requesting State fails to provide the guarantees described in article 8, or by adding to article 6 the phrase "subject to the guarantees provided for in article 8".

The second observation concerns the formulation of article 6, paragraph 1. As it stands at present ("an individual alleged to have committed ... is present"), the State concerned only has jurisdiction at such time as the person in question is present in that State. If one country requests another to extradite a person who is not - or not yet - in that country, the requested country does not - or not yet - have jurisdiction. It would only have such jurisdiction if universal jurisdiction in respect of the offences set out in the Code were enshrined in the national law of the country requesting extradition. The article should be reformulated with a view to making it more effective in practice, and/or parties to the Code should be required to establish universal jurisdiction in respect of the crimes included in the Code.

Article 7. Non-applicability of statutory limitations

The acceptability of this provision depends largely on the crimes to be included in the Code. Part I of the present commentary points out that only a limited number of crimes should be covered by the Code. The Netherlands Government feels that only these are the only crimes serious enough to justify exemption from statutory limitations. The Netherlands does not support the provisions of this article in respect of any other offences included in the present draft Code.

Article 8. Judicial guarantees

The Netherlands Government attaches great importance to the guarantees provided for in this article, as it has already indicated in its comments on article 6.

Article 9. Non bis in idem

This article, like article 6, will need to be amended if an international criminal court is established. The Netherlands Government has three further comments to make regarding the formulation of article 9.

Firstly, it considers paragraph 3 of this article incompatible with the principle of non bis in idem, since the decisive factor for the application of the rule is not the way in which a certain action is defined (in national or international law), but whether an action is punishable and whether the perpetrator has been prosecuted for it.

Secondly, the Netherlands considers the wording of paragraph 4 of this article unsatisfactory. The aim of the article is to ensure that a person who has committed a serious crimes does not, through dubious national proceedings, evade a punishment commensurate with the seriousness of the offence. At the same time, however, it has to ensure that the offender is not tried twice, in fair and proper proceedings, for the same crime, or sentenced twice to a punishment commensurate with the seriousness of the offence. The Netherlands Government feels that the present formulation fails to provide proper safeguards, especially against the latter contingency.

Finally, apart from paragraph 3 of this article, which has already been discussed, the Government feels that problems relating to the rule of "non bis in idem" can only be prevented by granting exclusive competence to the envisaged international criminal court (as explained in part I of the present commentary). In any other circumstances, problems would arise in connection with this rule. The ILC will consequently need to consider this issue when working out an enforcement system.

Article 10. Non-retroactivity

The Netherlands Government feels that the words "in accordance with international law" should be deleted from this article. Since the Second World War, certain offences have been codified under international law. As a result, it would prejudice the possibility of prosecuting and punishing the perpetrators of crimes which are not codified but might be considered offences according to international custom.

Article 15. Aggression

The Netherlands Government notes that there is an inconsistency in the wording of the first two paragraphs of this article. Paragraph 1 concerns the commission of a crime by an individual ("An individual who ... commits or orders ..."), whereas paragraph 2 refers to the actions of a State ("Aggression is the use of armed force by a State ..."). Either the article as such or the relevant commentary should clarify the ILC's views on the relationship between individual responsibility and the responsibility of the State.

To avoid any ambiguity, the words "inconsistent with the Charter" should come after the words "use of armed force" in the first line of this paragraph. In addition, these terms should be defined in the commentary.

The first part of paragraph 3 is inappropriate in this article, since it concerns the production of evidence, not the definition of the offence. The second part of the paragraph envisages empowering a political body to determine whether a particular act constituted an offence. This would violate the "nullum crimen sine lege" principle. This element should therefore also be deleted from the definition of the crime of aggression.

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Paragraph 5 could, by implication, provide that a determination by the Security Council is not binding on an (envisaged) international criminal court. This paragraph and the relevant commentary should be reviewed if an international court is indeed established.

Paragraph 5: For the sake of clarity, the word "existence" should be followed by "or not".

The "nullum crimen sine lege" principle also plays a role in the formulation of paragraph 4 (h) of article 15. Here, too, empowering the Security Council to determine that certain acts in retrospect constituted aggression and could be prosecuted as such would violate this principle. The only alternative would be for the Security Council to stipulate in advance and in general terms what constitutes aggression.

The meaning of paragraph 6 is unclear. It is questionable whether it in fact adds anything to the provisions of Article 103 of the Charter of the United Nations. The Netherlands Government recommends deleting this paragraph. Paragraph 7 could likewise be deleted.

Article 16. Threat of aggression

The Netherlands Government feels that this crime should not be incorporated in the Code; in several cases it would be covered by the prohibition on aggression as such, and would accordingly fall under the provisions of article 15.

Article 17. Intervention

The Netherlands Government feels that this article should also be omitted from the Code. One reason is that certain types of intervention are in any event covered by the prohibition of aggression and are consequently punishable under the terms of article 15. In the view of the Netherlands Government, the types of intervention not covered by article 15 are not sufficiently grave to merit inclusion in the Code. On the other hand, the definition seems too loose and ambiguous to allow for the enforcement of these provisions.

Article 18. Colonial domination and other forms of alien domination

For the same reasons as those given in respect of article 17, the Netherlands Government considers it undesirable for this article to be included in the Code.

Article 19. Genocide

The Netherlands Government is in favour of genocide being included in the Code. Indeed, it is a crime which, more than any other, outrages society's sense of right and wrong. It is to be hoped that the Code will help to enforce the prohibition against genocide, which has already been outlawed in a separate convention.

The Netherlands Government notes a discrepancy between the crime of aggression, where planning to commit the crime is an offence, and genocide, where planning the offence is not. As suggested in respect of article 3, the problem could be solved by amending each of the material provisions to conform to a uniform formulation, or by adding a further provision to article 3 specifying that planning to commit any of the crimes included in the Code is in itself a crime.

Article 20. Apartheid

The Netherlands Government is not in favour of including this in the Code. On the one hand, the very nature of the offence is apt to raise virtually insoluble problems concerning responsibility, prosecution, etc. On the other hand, it is in any event the case that apartheid would generally constitute systematic or mass violations of human rights.

Article 21. Systematic or mass violations of human rights

The Netherlands Government is of the opinion that this should be included in the Code of Crimes against the Peace and Security of Mankind, and that it merits attention in its own right, irrespective of the monitoring procedures relating to such violations laid down in various regional and global human rights conventions. The latter are designed primarily to evaluate - in retrospect - a State's fulfilment of its responsibility to observe human rights, rather than - as envisaged by the Code - the criminal responsibility of an individual who violates these rights. Furthermore, many of the existing monitoring procedures have proved inadequate in the cases of human rights violations which would fall under article 21 of this Code.

In addition, there is a close link between this article and the crime of genocide. For the sake of consistency, therefore, violations of human rights should be included in the Code together with genocide.

Regarding the text of article 21, the Netherlands Government would comment as follows: it would be desirable to interpret the term "persecution" in the same way as the term embodied in the Convention on refugees is interpreted. This is in fact a narrower interpretation than the one in the commentary to the article. In the view of the Netherlands Government, the reference in the commentary to persecution "by government officials or by groups that exercise de facto power over a particular territory" gives the concept a far wider interpretation than that within the context of the Convention on refugees.

The Netherlands Government would also prefer the word "and" instead of "or" in "systematic manner or on a mass scale". Only violations which occur both systematically and on a mass scale should be included in the Code, for only in such circumstances do they constitute acts which seriously conflict with society's sense of right and wrong.

The Government is further in favour of including "in a systematic manner or on a mass scale" in the chapeau of the article, to clarify the fact that it applies to all five of the violations listed. Furthermore, it would serve to establish that certain aspects of apartheid fall within the scope of this article. Consequently, subparagraphs (c) and (d) of paragraph 2 of article 20, which in the opinion of the Netherlands Government should be omitted from the Code, could be covered in the commentary to article 21.

The Netherlands Government would also like to see a clearer statement than at present, perhaps in a general article (such as article 3), of the fact that the Code concerns individuals who have committed a crime in an official capacity. This should in fact be included in the Code as such: it is not sufficient to deal with this issue in the commentary.

Finally, the commentary should include more references to universal human rights conventions than those already mentioned. They should not, however, be incorporated in the actual definitions of crimes.

Article 22. Exceptionally serious war crimes

The text of this article reflects the ILC's efforts to achieve a compromise between two different approaches to this category of offence: on the one hand, they have attempted to formulate a general definition of war crimes, and on the other, they have enumerated acts which they feel constitute war crimes.

The Netherlands Government supports the view taken by those members of the Commission who are opposed to an enumeration of acts to be deemed "exceptionally serious war crimes". In the first place, an enumeration of this type occurs nowhere else in the text, and secondly, it would also prevent any new developments in the field of warfare from being included under the provisions of the Code.

At the same time, the Government appreciates that it is extremely difficult to find a general term which is sufficiently precise but yet does not limit the scope of the article more than necessary. In this connection, the phrase "grave breaches" would not be suitable, considering that certain acts described as "grave breaches" in the Geneva Conventions of 1949 and Protocol I of 1977 are not sufficiently serious to be included in the Code, while others which are not described as "grave breaches" are eligible for inclusion. On the other hand, the Netherlands Government feels that the phrase "acts of cruelty or barbarity" is too loosely defined and allows too much scope for subjective interpretation to be suitable here.

The Netherlands Government consequently suggests that article 22, paragraph 2, should refer to "serious war crimes" - omitting the qualification "exceptionally" - which are defined as follows:

(a) Grave breaches as defined in the 1949 Geneva Conventions and Protocol I Additional to the Geneva Conventions;

(b) Other serious violations of the rules of international law applicable in armed conflicts.

Strictly speaking, category (a) is not absolutely necessary, given that the same provision is covered by category (b). Nevertheless, it should be stated explicitly for the sake of clarity. The qualification "serious" implies that not all war crimes are covered by the Code. The question as to whether a violation may be deemed "serious" will arise primarily when the expediency of prosecuting a crime is at issue.

The Netherlands Government agrees with the ILC that this article should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these circumstances. It would consequently be possible to invoke the article in response to human rights violations by insurgents. Furthermore, it would obviate the need to decide whether a conflict in a given case were national or international. The Netherlands Government feels that the commentary to the article should specify that this application widens the scope of existing law, since war crimes are not mentioned in Protocol II Additional to the Geneva Conventions. In addition, the commentary should examine this provision in relation to article 6, paragraph 5, of Protocol II, which urges the parties to the conflict to cooperate in achieving the widest possible amnesty after the cessation of hostilities.

Article 23. Recruitment, use, financing and training of mercenaries

Article 24. International terrorism

Article 25. Illicit traffic in narcotic drugs

Article 26. Wilful and severe damage to the environment

The Netherlands Government is opposed to the inclusion of articles 23 to 26 in the Code, since none of them satisfies the criteria set out in part I of the present commentary.

The concept of "international terrorism", moreover, which is the subject of article 24, could give rise to almost insurmountable problems of definition and interpretation.

Traffic in drugs, which is the subject of article 25, is of an entirely different order from crimes such as genocide, aggression or systematic and mass violations of human rights. The Government would again emphasize its view that the envisaged mechanism for enforcing the Code internationally would not be the most suitable means of punishing this offence. National enforcement instruments would be more appropriate in such cases, possibly based on the principle of universality or, alternatively, on the principle of "aut judicare, aut dedere", whose application would be established by a treaty.

NORWAY

[Original: English]

[22 December 1992]

1. Considerations of principle

The Nordic countries are basically in favour of a Code of Crimes against the Peace and Security of Mankind. However, the present draft must be supplemented extensively, both as regards important questions of principle such as when a perpetrator is to be excepted from accountability, and as regards the specific wording of the various penal provisions. Furthermore, the wording of the draft deviates from that which generally seems to be used in legislative drafting, and consequently, the Code could not be used in its present form by the courts of many countries.

2. Relationship to an international criminal court

One of the basic difficulties with the present Code is that its status is unclear. On the one hand, it could be a traditional convention under which each individual country undertakes to incorporate the punishable acts mentioned in the convention into its internal legislation as crimes and stipulates an appropriate penalty or to initiate an extradition process. One argument against such a solution is, however, that most of the crimes included in the draft Code are already covered by existing conventions or are contrary to current international and domestic law.

On the other hand, one could think of establishing an international penal code that is independent of national criminal law Given such a point of departure, it is difficult to assess the current draft as it only touches briefly on the procedural requirements for trying a case before a court of law.

As the Nordic countries understand the draft, the intention is merely to criminalize various acts according to international law, but whether such crimes should be prosecuted by an international criminal court or a court in the country concerned, or both, remains to be decided upon. We also interpret the draft to mean that the countries that accede to the Code will not thereby undertake a legal obligation to ensure that their internal criminal legislation covers all the acts defined as crimes in the draft Code. Many judicial systems, such as in the Nordic countries, will none the less require corresponding penal provisions in their internal law in order to institute a prosecution under the Code. Therefore, consideration should be given to whether States Parties to the Code will be required to carry out the necessary measures, including legislation, in order to ensure implementation of the Code.

There is a definite need for a court that can try certain particularly serious crimes for which, because of their international character, there is generally limited national jurisdiction, such as aggression, intervention and genocide. On the other hand, the Nordic countries see less reason to establish an international criminal court to try crimes that unquestionably are of an international character, but which have been dealt with so far under the internal criminal law of the respective countries. In our view, it would be most expedient to use the Commission's draft as a basis for drawing up a code to deal with such gross violations of the peace and security of mankind, which could both serve as a foundation for and come under the jurisdiction of a prospective international criminal court.

3. General comments on the draft Code

To a certain extent, several of the articles are directly based on existing international conventions concerning the respective crimes, and in these cases the relationship between the draft Code and the conventions in question must be clarified.

Another problem, particularly in the light of the high degree of precision required by penal law, is that a number of the key articles are so vague and ambiguous that they would create more confusion than clarity. Moreover, many of the articles make use of general concepts with political overtones, which leaves them open to a variety of interpretations. This applies, for example, to the wording of article 16: "any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". It may be difficult to determine precisely what is implied by that concept.

It is evident from the above that the crimes to be included in such a code must fulfil two criteria. First of all, they should be acts that are in reality a crime against the peace and security of mankind, i.e. they must fulfil the criterion of classification. Secondly, their nature must be such that they can be regulated by this kind of instrument, i.e. they must fulfil the criterion of suitability. As is pointed out in section 4 below, the draft Code includes a number of articles which, in the view of the Nordic countries, do not meet these two criteria. A code based on these criteria would be considerably less comprehensive than the present draft. The crimes that should be retained are primarily those outlined in articles 15 to 22 (aggression, intervention, colonial domination, genocide, systematic or mass violations of human rights, and serious war crimes), and which are committed on behalf of the authorities of a State.

A further problem with the present draft is that it fails to specify the degree of accountability that must subsist. As the Nordic countries understand the draft, it is generally sufficient that an offence has actually been committed. However, in certain articles it is specified that the provision is only applicable to acts that are committed "wilfully". In other cases it is stated that special motives must be present, cf. article 20, "for the purpose of establishing ...". In our view, it should be set out in a separate article in part I that the Code basically only applies to acts committed wilfully. Any exceptions to this can be specified in the articles in which the intention is to strengthen or weaken the requirements as to subjective accountability.

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Furthermore, the draft does not take account of the fact that there is a significant difference between cases in which the act has been carried out by individuals on their own initiative and those in which it is the consequence of a decision on the part of the respective countries' highest government bodies. Cases in which decisions are, for example, made by a national assembly comprising several hundred members pose obvious problems. In this context reference is made to article 20, paragraph 2, subparagraph (c), where "any legislative measures ..." may be regarded as apartheid. Is the intention here that all members of the national assembly who were instrumental in passing such a statute should be liable to a penalty? At any rate, this would not be a particularly practical course of action. In such cases, the criminal responsibility would rest almost automatically with the State in that it is the highest government bodies that act, and have jurisdiction under international law to propose or pass legislation on behalf of the State. In the view of the Nordic countries, it is not indicated clearly enough whether it is individuals or the State as such that is liable. The criminal responsibility of a State raises problems of enforcement that differ fundamentally from those raised by the articles that are directed at individuals. It is the view of the Nordic countries that the Code should apply only to criminal acts committed by individuals.

4. Comments on the respective articles

The following comments reflect the preliminary thinking of the Nordic countries on individual articles of the draft seen as a whole.

Article 1

The article appears to give a legal definition of the term "crimes against the peace and security of mankind" and can, as it is currently worded, be interpreted as being antithetical. Thus, the provision should be deleted as there is no need for such a definition. Moreover, it could be confusing because certain crimes included in the draft Code can hardly be said to be of such a nature.

Article 2

The principles set out in the article are acceptable as regards crimes that normally do not come under national jurisdiction because they would be contrary to international law. However, the draft Code includes crimes that are generally subject to conflicting national legislation. In our view, where this is the case the provision must at any rate be made less categorical.

Article 3

The article is a good illustration of the difficulties associated with the technique employed in the draft Code. If the aim is to establish an international criminal code, the question of determining individual accountability, criminal participation, complicity, various kinds of attempt, etc., must be resolved satisfactorily from the point of view of interpretation.

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Article 4

It is not difficult to imagine motives, e.g., in various kinds of emergency situations, which would affect the question of criminal responsibility. According to the wording of the article, however, no importance should be attached to such considerations. Thus, the article causes considerable problems and is therefore not acceptable in its present form.

Article 5

This provision must be retained in the draft Code in order to maintain the criminal responsibility of individuals and at the same time ensure that States are not relieved of responsibility for war reparations, etc.

Article 6

The Nordic countries presume that a decision not to indict a perpetrator is also covered by the term "try". This is in keeping with the corresponding interpretation of similar formulations employed in other international contexts. If an international criminal court were to be established, the substance of the principle "try or extradite" will have to be further elaborated.

Article 7

The absence of statutory limitation may be acceptable as regards the most serious crimes, but it is considerably more doubtful in those cases where conflicting national penal laws prescribe statutory limitation after a certain period of time.

Article 8

The article demonstrates clearly that the procedural requirements for a trial in accordance with the draft Code must be determined in connection with the formulation of the penal provisions. The minimum standards established for legal actions, which are taken from civil rights requirements, are reasonable as far as they go but far from sufficient as rules of judicial procedure for a court of law.

Article 9

A number of the substantive solutions that derive from this provision can be called into question. For instance, according to paragraph 4, an individual may be tried by a national court of one State even though he has been tried by the court of another State for the same offence if the former State has been the main victim of the crime. The Nordic countries interpret this to mean that this applies, for example, even if the person in question has already served a long prison sentence. Thus, the provision clearly conflicts with traditional principles of force of law in criminal law and

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should thus be worded in less categorical terms. A reasonable solution might be to provide that consideration by a national court should not prevent a crime from being tried in accordance with the Code, but that account should be taken of the sentence the convicted person is serving or is to serve in accordance with the sentence handed down by the national court.

Article 11

The provision establishes that the fact that an individual acted pursuant to an order of a superior does not relieve him of criminal responsibility provided that "it was possible for him not to comply with that order". The word "possible" as used in this provision must be more clearly defined. The consequences for refusing to comply with orders may vary widely, ranging from reprimands and dismissal to the death penalty. The intention cannot be that all such circumstances shall relieve the perpetrator of criminal responsibility. This problem should be dealt with explicitly in the text of the Code itself.

Article 12

The provision, which concerns a superior's failure to attempt to prevent a criminal act, goes further in terms of criminalizing such failure than is acceptable in the Nordic countries. In order for such responsibility to exist, it is generally required that the substantive provisions give rise to an obligation to act on the part of the person who has omitted to act. Moreover, it may be difficult to reconcile the provision with the definition of individual responsibility set out in article 3.

Article 13

It must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime against the peace and security of mankind. This must apply even if it is otherwise provided by the constitution of a particular State.

Article 14

Paragraphs 1 and 2 should be placed in separate articles because there is a fundamental difference between circumstances that absolve a perpetrator of responsibility for an act and circumstances that have a bearing on the sentence.

As it is currently worded, the article gives no indication of the circumstances to be taken into account when trying a crime. Thus, any court is free to interpret the provision, which is hardly in conformity with the rule of law. In the view of the Nordic countries, it would be appropriate to determine the significance of self-defence and state of necessity. The problem of consent may also arise in various contexts.

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Furthermore, the draft Code includes two other articles that deal with grounds whereby a perpetrator is to be excepted from accountability, i.e., articles 11 and 13. These should be combined with article 14. One way of doing this could be to enumerate the circumstances that except an individual from accountability, and those that do not. The circumstances set out in articles 11 and 13 of the current draft would then be among those that do not in any case incur accountability.

Another problem with the draft is that it does not include any provisions that govern cases in which a perpetrator is insane or otherwise unaccountable for his actions at the time of committing the act.

Article 14, paragraph 2, should also govern aggravating circumstances. Moreover, it is necessary to define and exemplify what is meant by the terms extenuating and aggravating circumstances, as the provision in its present wording is practically without substance.

Article 15

The provision concerning aggression fulfils both the criteria set out in section 3 above. It is, however, questionable whether the definition is suitable in all respects. Paragraph 3 includes a reference to the Security Council's determination of aggression. From a political point of view, the Security Council's competence in this matter is well founded. However, in a legal context it is not an acceptable approach, as the judgement of a court would then be dependent upon a political assessment.

Article 16

The criteria set out in section 3 above has, in our view, been fulfilled in this article as well. However, the provision could perhaps be limited to the "threat of violent aggression" in order to avoid charges for misdemeanours that are less serious than or fall short of genuine threats.

Article 17

The provision fulfils the criteria mentioned in section 3, but in some respects it seems to overlap with article 24 on terrorism. These two articles should be considered carefully, as it might be sufficient just to retain article 17, which is the more comprehensive of the two. There are, however, weighty political arguments for explicitly prohibiting terrorism in a separate article or, alternatively, in a separate paragraph in article 17.

Article 18

In the opinion of the Nordic countries, this provision does not fulfil the criterion of suitability set out in section 3. The wording "alien domination contrary to the right of people to self-determination" is too imprecise and probably too comprehensive. With its current wording, the provision could, for example, apply to various forms of trade boycott as well as situations where a donor country stipulates certain conditions in connection with development assistance. Thus the provision is open to different interpretations and could give rise to conflicts. It must therefore be made much more precise if it is to be retained.

Article 20

The Nordic countries hold the view that the provision on apartheid does not fulfil the criterion of suitability. What is more, the definition of the crime is clearly covered by article 21 relating to systematic or mass violations of human rights.

Article 22

Although the provision concerns "exceptionally serious war crimes", not all of the acts specified therein fall within this category, though they are definitely criminal acts. This applies, for example, to "unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities", cf. paragraph 2, subparagraph (a).

Article 23

In the view of the Nordic countries, the acts covered by the provision are in themselves not serious enough to be included in a code on crimes against the peace and security of mankind, particularly given the fact that the use of such forces in armed aggression or oppression of ethnic groups, etc., is covered by previous articles. In its current wording, the provision also covers negligent complicity in financing the services of mercenaries, and it is questionable whether such an act ought to be an offence at all.

Article 24

The scope of the provision is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is "an agent or representative of a State" should be covered. The other crimes included in the draft Code are not subject to such a limitation provided that individuals can contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that in many cases, conflicting penal provisions are to be found in national criminal law.

Article 26

It is important to establish some form of international legal regime which deals with the question of liability in connection with transboundary environmental damage. From a substantive point of view, it is clear that the article does not have the degree of precision required for a penal provision. The matter should therefore be considered further.

5. Forms of punishment

The Nordic countries presumed that imprisonment would be the most appropriate penalty as the draft Code should only include crimes that are so serious that a custodial sentence is the only conceivable form of punishment. As far as the death penalty is concerned, the Nordic countries have on several occasions expressed that it is unacceptable, even for the most serious crimes.

As regards assessment of sentence, we are of the view that a scale of penalties should be established for each individual article. Minimum sentences should probably also be prescribed in connection with a number of the penal provisions.

There is also a definite need for provisions concerning confiscation in addition to imprisonment. This could, for example, be quite practical in cases where cultural objects have been stolen in connection with a war.

6. Conclusion

In the view of the Nordic countries, it is most expedient to focus on the most serious crimes against the peace and security of mankind, and thus on a relatively limited code.

PARAGUAY

[Original: Spanish]

[30 November 1992]

The draft Code of Crimes against the Peace and Security of Mankind does not define such crimes but simply enumerates them and characterizes them as crimes under international law. Unlike other international instruments, it does not draw a distinction between crimes against peace, war crimes and crimes against humanity.

The principal crimes it lists are aggression and the threat of aggression, intervention, colonial domination and apartheid. Another group consists of the recruitment, use, financing and training of mercenaries. A third group is made up of genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs and wilful and severe damage to the environment.

Many of these crimes, such as genocide, war crimes and torture, are already covered by instruments emanating from the United Nations and the Organization of American States (OAS).

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The purpose of this draft is to supplement those norms by seeking to ensure effective protection for human rights and greater observance of the principles of non-intervention and self-determination of peoples, thereby helping to expand the legal protection of the international community.

In answer to the request of the International Law Commission, we should like to make a few comments on the provisions of the draft Code. Some, for example the one concerning article 15, relate simply to form or legislative technique. Article 15 states - as do others - that an individual who ... commits one of the crimes specified in the draft Code "shall, on conviction thereof, be sentenced ...". The phrase "on conviction thereof" is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

Article 14 provides that "the competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime". Defences (justifications, grounds for inculpability and for non-imputability) are so important a matter in penal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate. It would be wiser, if we do not wish to spell out the grounds for the defence, to refer to the laws of the country in which the crime was committed.

Article 3, paragraph 1: "An individual who commits a crime against the peace ... is liable to punishment". Penal norms are by nature imperative; "is liable" should therefore be amended to read "shall be liable". The same applies to paragraphs 2 and 3.

Article 7: Whatever our views may be regarding derogation from the principle of statutory limitation for criminal action and punishment, this article merely follows the system established with respect to such crimes in similar international instruments. Instead of declaring the non-applicability of statutory limitations, however, we should establish a longer time-limit or limitation than that applicable to common crimes.

Article 9: Paragraphs 1 and 2 establish the rule of non bis in idem, however, paragraph 3 weakens it considerably by providing that, if an individual has been punished for a crime under ordinary law, he may be tried and punished again for a crime covered by this Code. Such a provision works against the principle of non bis in idem, the right not to be tried more than once for the same act, a legal guarantee for the accused instituted for the preservation of legal safeguards.

The same applies to the provisions of paragraph 4 (a) and (b). It should be acknowledged, however, that paragraph 5 would help mitigate the effects of the aforementioned paragraphs.

With regard to the end of paragraph (2) of the commentary, it should be pointed out that, under Paraguayan law a dismissal of proceedings has the same effect as an acquittal, although it is pronounced during pre-trial proceedings rather than during the trial.

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Article 10: It is not advisable to limit the principle of non-retroactivity. Nullum crimen, nulla poena sine lege is a cardinal principle of the legal order and it is dangerous to permit exceptions to it. We believe, therefore, that paragraph 2 of this article should be deleted. Paragraph (3) of the commentary is also unacceptable, for it seeks, without justification, to give the word "lex" a very broad meaning, encompassing not only written law but also custom and general principles of law. It would have the effect of virtually negating the principle of the legality of crimes and penalties as cited.

Articles 16: Threat of aggression. Paragraph 1, which refers to committing a threat or ordering the commission of a threat, is too broad and imprecise. In order for a threat of aggression to constitute a crime, there must be a reasonable probability, as evidenced through actions, that aggression will take place.

Article 17: Fomenting and financing armed activities is not the only form of intervention in the external affairs of a State; intervention may take more subtle, covert and effective forms, such as attacks or measures of an economic nature that severely disrupt the life of a country, forcing it to accept the demands being placed upon it.

Article 19: The crime of genocide was set forth in an earlier international convention adopted in 1948, and it remains unchanged in this instrument. If any change is to be made, subparagraph (e) could be expanded to cover adults as well as children.

Article 21: Systematic or mass violations of human rights. This is similar to the crime of genocide (article 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of genocide, and it refers to systematic or mass violations of human rights. The differences do not seem to be fundamental.

Article 22: There are already many international conventions on war crimes, and these are referred to in the commentary on this article. It is legitimate to ask whether there is any need to have yet another category of crime, namely exceptionally serious war crimes, and whether degree of seriousness is a sound criterion to use in defining an offence for which other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

Article 24: This article covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which exist in the international community today.

Article 26: Given the current gravity of ecological problems, it was deemed appropriate that severe damage to the environment should be established as an offence under international criminal law.

The Commission saw fit to include the offence of total or partial annexation in the draft; it is defined as the total or partial annexation of a sovereign State by another, through the use of violence or other illicit means.

SENEGAL

[Original: French]

[18 December 1992]

On 5 November 1992, during the debate on this item in the Sixth Committee, the Senegalese delegation welcomed the quality of the report submitted by the Special Rapporteur of the International Law Commission, and the efforts he has been making, over the past 10 years, to draw up a code of crimes and a statute for an international criminal jurisdiction.

The Government of Senegal believes that the international community can no longer ignore the problems posed by the expansion of criminality to international dimensions.

Punishment of these crimes often involves a number of legal systems, and the legislation is very often not compatible. This situation creates conflict of law in space, making it difficult to punish crimes promptly and effectively, not to mention the tensions that often arise as a result of requests for extradition.

Accordingly, there is a pressing need for the international community to try to harmonize penal legislation in order effectively to combat crime and offences of an international nature. This undertaking must be geared, as a matter of priority, to prevention, because punishment is but an imperfect means of fighting criminality.

For all these reasons, Senegal supports the principle of the elaboration of a convention in respect of crimes against the peace and security of mankind and an international criminal jurisdiction, it being understood that said convention would define the legal framework for international judicial cooperation, which is, now more than ever, necessary in order to combat crime and delinquency in general, inter alia, by providing technical and financial assistance to the developing countries.

SUDAN

[Original: Arabic]

[26 January 1993]

1. An article should be inserted at the beginning of the draft Code to define those terms and expressions used in the text which require a definitive legal explanation in order to prevent any individual interpretations or disputes that might arise.

2. The provisions of the draft Code do not distinguish between crimes committed by a person in the territory of his own country and those committed in another country. A distinction must be made between these two types of crime, and it must be determined which court is competent to rule on such crimes against foreigners as are committed by nationals of a given country.

3. It is necessary to determine which court or courts are competent to rule on the crimes specified in the draft Code.

4. The failure to determine penalties for any of the crimes specified in the draft Code means the picture is not sufficiently complete to allow comment as to whether the penalties are appropriate and likely to lead to a curtailment of such crimes.

SWEDEN

[See Norway]

TURKEY

[Original: English]

[15 January 1993]

General views

1. Approval of the draft Code initially as a declaration, to be converted into a binding document subsequently, will be appropriate.

2. The fact that some of the issues entailed in the draft are taken up in certain treaties and that national bodies are authorized to follow lawsuits and issue sentences on those issues may create difficulties for signatory States in harmonizing their obligations under such treaties with those under the draft Code.

3. The draft would improve if penalties could be specified along with crimes. However, it would be appropriate to allow the judges to decide along a range between minimum and maximum penalties, rather than stipulating specific sentences for each crime.

4. The draft should not include crimes on which complete agreement has not been attained.

Views on articles

1. In article 16 of the draft, threat to use force is cited among crimes against the security of mankind. This article stipulates punishment for the leader or the person organizing the crime of threat to use force, in its paragraph 1. The second paragraph of the same article envisages that threat of use of force entails declarations and displays of force appearing to Governments as threat of use of force against their countries. This concept is referred to in the Charter of the United Nations as well. However, as the Charter constitutes a treaty that brings commitments to member countries, and not to individuals, it would be essential to clarify how personal responsibilities would emanate from such a crime. Furthermore, in cases where a crime of threat to use force is committed by individuals, subjective assessments might often be made on the elements constituting the crime, on whether the person acted on behalf of his Government or not or in deciding who actually committed the crime.

2. Article 10 of the draft stipulates the principle of non-retroactivity. According to this article, no one will be convicted for crimes committed prior to the entry into effect of the Code. Paragraph 2 of the same article foresees that this article will not preclude the trial and sentencing of individuals in accordance with applicable international and national laws and regulations valid at the time of commitment of a crime. This principle is among the basic principles of criminal law and should be made use of in the draft.

3. After the enumeration of the acts of the use of force in paragraph 4 (h) of article 15 of the draft Code, it is pointed out that the Security Council will also be able to determine, in accordance with the Charter of the United Nations, other acts that might also be considered as criminal. However, one of the basic tenets of criminal law and a safeguard for the offender is that the elements of and the penalty for the offence would be predetermined. In the light of this principle, such a stipulation that might result in the devising of the offences that cannot be foreseen in advance would not be appropriate.

4. Under the title of "inapplicability of statute of limitations" in article 7, the said statute is considered as inapplicable in cases of crimes perpetrated against the peace and security of mankind. Even though the underlying idea of the article is tenable, in the case of the establishment of a future international criminal court, a statute of limitations - perhaps a relatively extensive one - should be envisaged for abuse-of-the-law cases brought against certain countries.

5. Under the heading "exceptionally serious war crimes", paragraph 2 (f) of article 22 foresees that acts of aggression against religious, historical and cultural values shall be considered as war crimes. It will be appropriate to expand this paragraph to include the theft, smuggling and destruction of those items of religious, historical, cultural and scientific or technological value as well, carried out in the chaotic atmosphere of times of war.

6. It should be reconsidered whether the acts mentioned in paragraph 2 (a) of article 22 (acts of cruelty or barbarity directed against the life, dignity or physical or mental integrity of individuals) under the heading "exceptionally serious war crimes" is actually in conformity with that heading.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[29 January 1993]

Introduction

1. The Government of the United Kingdom is concerned at the continuing lack of rigour in the preparation of the draft articles and the consequent lack of precision. Many of the proposed crimes set out in part II are vaguely defined, with the elements that are to constitute the crime far from clear. When defining any crime the need for legal precision is paramount.

2. In approaching this topic the United Kingdom has always been of the view, expressed often in the Sixth Committee, that the Commission must start with a working concept of what constitutes a crime against the peace and security of mankind. A member of the Commission has referred to the "scaffolding" of the tripartite classification of crimes against peace, war crimes and crimes against humanity, which has guided the Commission's work. 1/ Although this classification does not appear in the draft, it has served merely to subdivide a category of crimes, the outer parameters of which remain undefined. As a guide to the enumeration of specific offences the criterion of "extreme seriousness" is insufficient, being highly subjective and elastic. Strongly conflicting views within the Commission regarding the crimes to be included bear witness to the difficulties in following an enumerative approach without a working concept. If the work of the Commission is to have any success it is fundamental that there should be a rational distinction between international crimes and crimes against the peace and security of mankind. In identifying those crimes which are thought to constitute crimes against the peace and security of mankind, the Commission has quite properly drawn on the 1954 Draft Code for guidance. Less satisfactory is the reliance placed upon article 19

1/ *Yearbook of the International Law Commission, 1986*, vol. I (United Nations publication, Sales No. 87.V.7), p. 118, para. 67.

of the Commission's draft articles on State responsibility, which are not concerned with individual criminal responsibility, many of the more objectionable elements of the present draft Code may be traced to the Special Rapporteur's reliance upon that article. This applies in particular to articles 18 (colonial domination), 20 (apartheid) and 26 (environmental damage). Such reliance is misplaced since it fails to acknowledge the fundamental distinction between State responsibility and individual criminal responsibility. It is only the latter with which this draft Code is concerned.

3. Several of the draft articles would have to be recast in the event that an international criminal jurisdiction is realized. It is also clear that if the Code is to function effectively it will be necessary to obtain widespread support for it. As currently drafted, the Code is unlikely to attain such support; certainly the United Kingdom is unable to support it. Indeed, with so many of the crimes which the Commission has included in part II already addressed in international conventions, it is increasingly difficult to see what lacuna is being filled by the Code.

4. At the request of the General Assembly, the Commission is currently heavily committed to the task of producing a draft statute for an international criminal court. The United Kingdom has already indicated in the Sixth Committee that it shares the widespread view that work on the court should not be coupled with that on the Code. The United Kingdom believes that it would make most sense, in the development of its work perogramme as a whole, to suspend all work on the Code until it has completed the drafting of a statute for a court. That would then provide a suitable point for the position to be reviewed by the General Assembly.

Detailed comments

5. Against the background of these introductory remarks, the United Kingdom has the following detailed comments to offer on the draft articles.

PART I. Chapter 1. Definition and characterization

Article 1

6. The draft adopts an enumerative approach to the definition of crimes against the peace and security of mankind. This approach, which was also that adopted in article 1 of the 1954 Draft Code, is the only one which would allow the constituent elements of each offence to be properly defined. However, the deficiencies of the working methodology of the Commission have been noted above. The rationale for the inclusion or exclusion of particular offences appears arbitrary. It is difficult to discern the reason for excluding slavery, piracy, traffic in women and children, and hijacking, which are all well established in international law, while including hitherto unknown "international crimes" such as mercenary activities and wilful and serious damage to the environment. The inclusion of the words "under international law" is neither necessary nor useful.

Article 2

7. The United Kingdom recognizes that a clarification of the relationship between international and municipal law regarding the characterization of an act or omission as a crime against the peace and security of mankind may be both desirable and necessary. However, it is not readily apparent from the terms of this article what problem it is addressing. It is hardly conceivable that acts should be punishable pursuant to an international code which are not in general of a type punishable under national criminal law. One suspects that the article has in mind that the perpetrator of an offence under a code may not be exonerated by virtue of the act not being criminal by the law of the place in which it was committed at the time of its commission. The reference in the commentary to the Nürnburg Charter supports this interpretation. If this is what the Commission does intend, the article should say so.

Chapter 2. General principles

Article 3

8. This article rightly focuses upon the criminal responsibility of individuals. However, paragraph 1 includes no requirement of intent - or mens rea - which is a fundamental element for serious crimes. The Genocide Convention, for example, refers in article II to "acts committed with intent", language which is repeated in article 19 (2) of the Code. Paragraph 1 reflects the approach of those in the Commission who considered that intent can be deduced from the "massive and systematic nature of a crime" (paragraph 3 of the commentary). This approach confuses the elements of a crime with their proof. The enormity of acts committed may raise a presumption of intent at the highest levels of command, though even there it should be permissible to introduce evidence to rebut the presumption, if such evidence exists. But the great majority of potential defendants will be those who have played only a small part in large events and in their case the state of the individuals's knowledge is crucial. The point emerges clearly from a study of paragraph (2). The Code should provide either in part I, or in part II in respect of each individual crime, that intent is an essential element.

9. Paragraph 3 attributes responsibility for an attempt to commit a crime against the peace and security of mankind. It will be essential to insert the relevant articles to which this provision is intended to apply. It would be nonsensical to speak, for example, of an attempt to commit a threat of aggression (article 16).

Article 4

10. This provision would be more appropriately located as part of article 14 which addresses defences and extenuating circumstances, where it might be stated simply that motive does not constitute a defence. To the extent that motive constitutes one of the requisite elements of a crime, this can and

should be included within the definition of that crime. The mischief against which this article is addressed, namely, a perpetrator claiming a motive different from the one required as an element of the crime, may be adequately addressed within the compass of the definition of the crime, and is ultimately an issue of proof as to whether the required motive was present. Any other motive is irrelevant.

Article 5

11. While the principle underlying this article is accepted, the article should be worded in such a way as to admit the possibility that at least one requirement in discharging the State of its responsibility may be to hand over specified individuals to stand trial.

Article 6

12. In the absence of an international criminal jurisdiction with compulsory jurisdiction the Commission has perforce addressed this article from the vantage point of indirect, municipal enforcement of the Code. To be effective, this requires (i) broad participation, not just by "victim" States, (ii) a wide basis for jurisdiction and (iii) curtailment of the political offence exception. Only the second of these requirements is met by the draft articles. And the treatment of universal jurisdiction is sketchy. Whether or not the Commission is successful in drawing up a statute for an international criminal court, it will be necessary, as the commentary recognizes, to formulate more specific rules for the actual implementation of the Code. The United Kingdom assumes these will be on the lines of articles 2 to 11 of the Hostages Convention, and similar conventions.

13. The obligation to prosecute or extradite contained in paragraph 1 is found in many international conventions. The commentary elaborates further upon the meaning of "try", which is intended to cover all the stages of prosecution proceedings, an elaboration which could usefully be incorporated in this article. But it would be preferable to employ the more usual formula "submit the case to its competent authorities for the purposes of prosecution". It also needs to be made clear that the States referred to in this article are only States which are parties to the convention containing the Code. The concept of universal jurisdiction is based on the notion that crimes against the peace and security of mankind affect all States wherever they are committed and irrespective of the nationality of the perpetrator or of the victims. However, paragraph 2 reflects the difficulty encountered by the Commission in allocating priorities when extradition is sought by a number of States with an interest in prosecution. For practical evidentiary purposes, the State in whose territory the crime was committed is usually given priority in existing conventions. But effective enforcement of the Code could be undermined by according priority to the territorial State if government officials are involved or the crime results from the official policy of the State. Despite article 13, realistically the likelihood of any provision proving workable where extradition is sought for senior government or military figures from the State in which they have carried out their

official acts is remote. A further practical problem arises where extradition is sought with no real intention to prosecute. For paragraph 2, it would be preferable to have an order of priorities with the concomitant obligation on the extraditing State to ensure that the requesting State has a bona fide intention to prosecute.

Article 7

14. The suggested rule could hamper attempts at national reconciliation and the amnesty of crimes. Whether and under what conditions the latter should be permitted, and the effect upon the draft articles, should be more carefully examined by the Commission. In this connection article 9 needs to be considered. If, for example, a State granted an amnesty to all government officials who had participated in the commission of a crime under the Code, article 9 would under certain conditions still permit their prosecution by another State or by an international criminal court. Whether the amnesty would be seen as a bona fide attempt at national reconciliation or a cynical measure designed to sidestep indirect enforcement of the Code would depend upon the circumstances. Clearly the granting of amnesties could impair the efficacy of indirect enforcement under the Code, and is an issue which needs to be addressed by the Commission.

Article 8

15. This is an essential provision, one of the few which address the proper implementation of the Code. Judicial guarantees are of particular importance where the perpetrator is accused of heinous crimes of the kinds enumerated and which raise high emotion. Article 8 would be improved if the clarifications contained in paragraphs (6), (7) and (8) of the commentary were incorporated in the text of the article.

Article 9

16. This article acknowledges the interface between municipal and international law: according to it individuals are not immune from double culpability where ordinary crimes constitute also crimes under the Code. The United Kingdom reserves its position on this proposal, which at first sight conflicts with the corresponding provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights, to both of which it is a party. For the moment, the United Kingdom wishes only to point out that paragraph 4 goes even further and permits an individual to be tried in more than one State for a crime under the Code, although paragraph 5 would operate to reduce the penalty upon a subsequent conviction. As currently drafted, there would be nothing to prevent a State in whose territory the crime was committed, or which has been the main victim of a crime, from trying and punishing an individual who has already been tried and punished in the State of which he or she is a national, in both instances for the same crime under the Code. The only safeguard is that mentioned in paragraph 5. If the mischief against which this aspect of the rule is directed is to prevent too lenient a punishment in the State of which the

individual is a national, then paragraph 4 would make more sense if it rendered the jurisdiction of the national courts specified therein dependent upon a failure adequately to punish in the first instance.

Article 11

17. While agreeing with the Commission that this provision might well have been included as part of article 14, the United Kingdom accepts that the importance of the question, and its relationship to the issue raised in article 12, suggests its inclusion at this point. The language, drawn from the 1954 Draft Code, is not entirely felicitous: an individual would not be relieved of criminal responsibility if, "in the circumstances at the time, it was possible for him not to comply with an order of a superior". As presently drafted, it is far from clear when compliance with an order would operate as a defence to a crime under the Code because, in the circumstances at the time, it was not possible to disobey that order. Moreover, this wording would seem to make a large inroad into the principle in article 8 of the Charter of the Nürnburg Tribunal that superior orders are not a defence, but may be considered in mitigation of punishment. Nor is it consistent with the 1984 Torture Convention which provides that superior orders "may not be invoked as a justification of torture" (article 2 (3)). This article needs to be re-examined, taking into account the very serious nature of the crimes considered in this Code and the general trend internationally towards the expansion of individual responsibility.

Article 13

18. It is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and to consider the relationship of this draft with existing rules on the subject.

Article 14

19. It is clearly undesirable to leave vague a provision so vital both to the conceptualization of a crime against the peace and security of mankind and to the rights of the defendant. The more grave the crime, the less likely it is that a wide panoply of defences and extenuating circumstances will be permitted. If, as currently envisaged under article 6, it is national courts which will have jurisdiction under the Code, article 14 needs to be redrafted. National courts cannot be left to delineate defences and extenuating circumstances which will be admitted under the Code. Fairness and consistency would be entirely lost. It is symptomatic of the haste and lack of precision with which these articles have been drafted that paragraph 1 leaves open the possibility of defences to match specific crimes without any attempt at enumeration. Separate enumeration would be the better approach;

although certain general defences will apply to all crimes, it is difficult to conceive of "blanket defences" which will adequately cover the circumstances of each and every crime set out in part II.

PART II

20. By far the most disappointing feature of the draft is part II and the crimes enumerated therein. As one of the members of the Commission noted, it is easy to express moral indignation but less easy to describe in abstract legal terms the primary rules and all the legal consequences flowing from their violation. 2/ There are three fundamental weaknesses in the Commission's approach. First, the Commission was not guided by a concept of crimes against the peace and security of mankind in selecting crimes for inclusion in this part. As a consequence, the crimes listed in part II cannot be regarded as a logically defensible or coherent catalogue of crimes against the peace and security of mankind. Secondly, the articles fail to maintain the distinction between international crimes in general and crimes against the peace and security of mankind, and between crimes committed by an individual and those which may be attributable to the State. Thirdly, many of the definitions of the crimes contained in this part are derived from General Assembly resolutions and international conventions which have not in every case garnered widespread support and which, in any event, need much closer examination to ensure that the language used is appropriate to a criminal code. The comments which follow should be regarded as sample criticisms only, identifying some of the worst defects of part II as it stands.

Article 15

21. The United Kingdom has grave doubts concerning this article. Most of it is a repetition of the definition of aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That resolution was intended in terms to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, but which had been left undefined. The United Kingdom agrees entirely with those members of the Commission who considered that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to mention the resolution by name. The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (h) offends against the principle "nullum crimen sine lege", as well as operating with potential retrospective effect in contravention of article 10.

2/ Yearbook of the International Law Commission, 1985, vol. I (United Nations publication, Sales No. 86.V.4), p. 35, para. 3.

Article 16

22. This article is unacceptable. If there is a crime of threat of aggression (which is open to doubt), it would be more appropriate for State responsibility than individual criminal responsibility. The definition in paragraph 2 is unsatisfactory, leaving as it does the exact nature of the crime unclear, notwithstanding the Commission's attempt at an enumerative definition. The actions listed in paragraph 2 have a collective flavour inappropriate to the creation of individual criminal responsibility. The phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" does not begin to meet the test of precision required of a criminal code.

Article 17

23. In his sixth report in 1988 the Special Rapporteur posed the rhetorical question, "[i]n view of the nuances and degrees involved, is the notion of intervention not too general and too varied in its manifestations to constitute a legal concept?" 3/ "Intervention" is indeed a term of great conceptual generality, lacking the necessary precision required to define criminal conduct. The activities listed in paragraph 2 accomplish little by way of necessary clarification and narrowing of the concept. It is in any event doubtful whether intervention is a crime which should attract individual criminal responsibility. The sources relied upon by the Commission, in particular the judgment of the International Court of Justice in Military and Paramilitary Activities in and against Nicaragua, are concerned with the lawfulness or otherwise of intervention by a State in the internal or external affairs of another State. They do not deal with criminal responsibility, still less with the penal responsibility of individuals under international law. "Intervention" as a crime attracting individual criminal responsibility is not recognized in international law nor, in the opinion of the United Kingdom, should it be.

Article 18

24. Terms such as "colonial domination" and "alien domination" do not possess the requisite legal content necessary for inclusion in a code of crimes and have no foundation in international criminal law. "Colonial domination" is, in any event, an outmoded concept redolent of the political attitudes of another era. Its presence in article 19 of the draft articles on State responsibility is no justification whatsoever for its presence in the Code. The United Kingdom regrets the introduction of what are little more than political slogans into a code intended as a legal instrument. Rather than employing labels which encompass both permissible and impermissible behaviour, the Commission should identify and define the acts or practices proposed to be

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3/ A/CN.4/411, para. 22.

punished. Acts committed during "colonial or alien domination" may, when further defined, fit within other provisions of the Code concerning, for example, genocide (article 19) or systematic or mass violations of human rights (article 21).

Article 19

25. The Commission should consider the relationship between the Code and article IX of the Genocide Convention, which provides for the compulsory jurisdiction of the International Court of Justice in the case of disputes between Contracting Parties relating, inter alia, to the responsibility of a State for genocide.

Article 20

26. Just as the present draft is intended to update the provisions of the 1954 Draft Code to take into account subsequent developments, so too should the Commission take fully into account political developments in the decade since it started work on the present draft. Discussion of apartheid in the Commission naturally focused on South Africa, though mention of that State was subsequently dropped and the draft article now applies without reference to time or place. The Commission needs fundamentally to reconsider this article in the light of changed international circumstances.

Article 21

27. Attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as "systematic of mass violations of human rights": the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but the article is incomplete and unsatisfactory. The commentary makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Torture Convention should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

Article 22

28. In opting for a "middle-ground solution", reconciling competing trends within the Commission, the Commission risks proliferating the categories of war crimes without any attendent benefit. If the Commission were to retain this article, the United Kingdom would prefer to see a provision which accords with existing characterizations of war crimes, replacing "exceptionally serious war crimes" with "grave breaches of the Geneva Conventions", for example.

Article 23

29. While mercenary activities may in certain circumstances be reprehensible, it is the view of the United Kingdom that they have no place in a Code of Crimes against the Peace and Security of Mankind. The activities are not sufficiently widespread and grave to merit inclusion in the Code. Nor have they yet achieved the status of generally recognized international crimes. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries has yet to achieve more than a handful of adherents.

Article 24

30. The United Kingdom regrets that the Commission has, as in the 1954 Draft, limited the scope of the article to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and "internal" terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of "internal" terrorism. The latter is in practice more of a problem for many States than international terrorism. It should consider also the relationship of this article with international crimes omitted from the Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

Article 25

31. The 1954 Draft Code omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

Article 26

32. The origin of this provision lies in article 19 of the Commission's draft articles on State responsibility, where its inclusion proved controversial. It is no less so here, since there is certainly no general recognition of "widespread, long-term and severe damage to the natural environment" as being an international crime, much less a crime against the peace and security of mankind. Environmental damage may give rise to civil and criminal liability under municipal law but it would be extending international law too far to characterize such damage as a crime against the peace and security of mankind.

/...

Conclusion

33. The United Kingdom considers that the Commission could more usefully deploy its limited resources to other topics in its work programme. As indicated above, it believes that work on this topic should be suspended, at least until work has been completed on a draft statute for an international criminal court.

UNITED STATES OF AMERICA

[Original: English]

[1 February 1993]

A. General comments

The Government of the United States appreciates the opportunity to submit the following written comments and observations on the draft Code of Crimes Against the Peace and Security of Mankind (draft Code), as requested in accord with paragraph 9 of General Assembly resolution 46/54 of 9 December 1991.

The United States supports development, in appropriate contexts, of individual international criminal responsibility, and is a party to most of the international conventions containing the prosecute-or-extradite requirements with respect to particular international offences. These conventions already go quite far in elaborating a number of internationally recognized offences which could be characterized as being against the peace and security of mankind, including war crimes, genocide, torture, drug offences, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes involving nuclear material, crimes against officials and diplomats and hostage-taking.

The United States, however, does not support the present draft Code because it is defective in many fundamental respects. Since many of the offences set forth in the draft Code are already covered by existing international conventions, much of the draft Code is either redundant or disruptive (especially where it deviates from existing statements of the law). Moreover, many of its suggestions for the development of new criminal offences are unacceptable to the United States . Throughout, the draft Code ignores basic concepts of criminal liability (for example, the state of mind necessary to be charged with a criminal violation). It also neglects concepts of due process basic to the United States and many other countries' jurisprudence, such as that offences must be defined with precision sufficient to inform people of what acts will be considered criminal. Moreover, the Code, as drafted, does not contribute to resolving any of the technical difficulties or lacunae that complicate the use of existing international conventions as a possible basis of subject-matter jurisdiction of an international criminal court. While a draft Code is by no means the only, or necessarily the best, way to solve these problems, it is noteworthy that the current effort does not do so.

The United States believes that the primary problem with many international crimes is not that they are undefined, but rather that they are not adequately prosecuted. This problem is particularly acute with respect to crimes committed either on behalf of, or with the tolerance of, Governments. The adoption of the Code would not solve this problem. In the view of the United States the most effective response to the problem of international crime is to strengthen cooperation among Governments in the investigation and prosecution of those committing criminal acts. The United States believes the International Law Commission's time would be more productively spent on such measures than on continuing its efforts with respect to the draft Code.

B. The problem of vagueness

One major problem with the draft Code is its vagueness. The Code consistently fails adequately to define key terms, and frequently fails to specify precisely what actions are subject to criminal liability. It often adopts political terms that have no accepted legal definition and wraps them with a legal cloak. Because such political terms are often perhaps deliberately ambiguous, different domestic courts would inevitably disagree over the interpretation of the Code. Moreover, the ambiguously drawn offences fail to provide adequate notice concerning the type of acts that could form the basis for criminal liability. Consequently, the Code, in its present form, could run afoul of the due process protections basic to United States and other countries' jurisprudence.

C. Failure to specify mental state necessary for the imposition of criminal liability

A second fundamental flaw that permeates the Code is its failure to specify the requisite knowledge or intent necessary to impose criminal liability on a potential defendant. In the United States system, criminal acts punishable by incarceration ordinarily must be committed knowingly or intentionally. The general failure of the Code to address a defendant's knowledge and intent is further compounded because the article on environmental crimes - in contrast with the other articles - specifies that the crime must be committed "wilfully". No other article has this provision, and the significance of this discrepancy is unclear.

D. Specific difficulties with substantive sections

1. Article 15. Aggression

The Code's definition of aggression is taken from the General Assembly's 1974 Definition of Aggression (resolution 3314). The General Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not a binding criminal definition.

2. Article 16. Threat of aggression

The Code proposes the creation of a new international criminal offence, based only on the threat of aggression. In addition to the defect in the definition of aggression upon which this article relies, the United States has grave reservations whether the mere threat to engage in an aggressive act should be a criminal violation. While it is axiomatic that no nation has a right to threaten another nation with an act of aggression, 1/ it is equally true that such threats - if not acted upon by a threatening nation - are more appropriately addressed among States rather than by a criminal action against individuals in a court of law. Far from reducing conflicts, this new offence would most likely serve to generate tensions among nations by encouraging criminal charges for statements or conduct that instead could better be addressed through constructive diplomatic dialogue.

3. Article 17. Intervention

This section proposed the establishment of a new international crime called "intervention". This new crime not only is vague, but also apparently attempts to cover acts that would not otherwise fall within the already overly broad and vague crime of "aggression". Moreover, although it provides an exception for acts undertaken pursuant to the "rights of peoples to self-determination", it fails to create an exception for acts of collective self-defence, which are explicitly provided for in Article 51 of the Charter of the United Nations. As with the crime of aggression, this crime of intervention is based on a General Assembly resolution that was never intended to be the legal basis of imposing criminal liability on individual defendants.

The article on intervention is based on the Declaration on Principles of Friendly Relations, 2/ which elucidated the familiar principle that States should not intervene in matters exclusively within the domestic jurisdiction of any State. The Code's wholesale criminalization of the non-intervention principle is not only divorced from the practical relationships among nations, but also is an open invitation to criminalize disputes that should more appropriately be resolved by the careful and prudent practice of diplomacy or, when necessary, by reference to the Security Council of the United Nations. It may also be noted that significant disputes still exist over the precise scope of this principle; some States, for example, still argue that international concerns for human rights constitutes impermissible intervention in their internal affairs.

1/ Charter of the United Nations, Article 2, paragraph 4; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) (hereinafter referred to as "Declaration on Principles of Friendly Relations").

2/ Supra, note 1.

4. Article 18. Colonial domination and other forms of alien domination

The proposed crime of colonial domination suffers from the same defects that afflict the offences previously discussed. It is vague and overly broad, in that it fails to define, or even describe, "colonial domination" or "alien domination contrary to the right of peoples to self-determination". This failure is particularly grave in the present international climate, which is witnessing the emergence of smaller nations from the territory of larger ethnically diverse societies. Any attempt to criminalize conduct such as "alien domination" would most likely serve only to increase international tensions and conflicts.

5. Article 19. Genocide

The crime of genocide is already defined by the Convention on the Prevention and Punishment of the Crime of Genocide, 3/ to which the United States and many other States are party. United States ratification of the treaty was based on several understandings. In particular, the United States indicated that it understands that the term "intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such", as used in the Convention, means the "specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such" by the acts prohibited in the Convention (emphasis supplied). The Code's definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

6. Article 20. Apartheid

The draft Code's definition of the "crime of apartheid" contains many of the same defects that are present in the "colonial domination offence". It is so vague and broadly worded that it could be contrary to the United States and other countries' constitutions.

7. Article 21. Systematic or mass violations of human rights

This article is too vague to impose criminal liability. The crime of "persecution on social, political, racial, religious or cultural grounds" in particular is so vague that it could mean almost anything. For example, one definition of "persecute" is "to annoy with persistent or urgent approaches, to pester". 4/ It should not be an international crime for one political

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3/ United Nations, Treaty Series, vol. 78, p. 277.

4/ Webster's Ninth New Collegiate Dictionary.

party to "annoy" or "pester" another political party, yet under the plain meaning of the draft Code that could be an international crime. This article also fails to fully consider the effect of the International Covenant on Civil and Political Rights, 5/ which spells out the specific human rights recognized by the vast majority of the international community. This article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. We note further that deportation of persons may under many circumstances be lawful; this current formulation is thus overly broad.

8. Article 22. Exceptionally serious war crimes

This article seeks to punish "exceptionally serious war crimes", a term which is tautologically defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of, *inter alia*, acts of inhumanity ...". This article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions specifically dealing with the law of armed conflict. 6/ For example, the vague prohibition on the "unlawful use of weapons" does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, we think it unwise to include only "exceptionally serious war crimes" and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

5/ *International Legal Materials*, vol. VI, p. 368 (1967); see also General Assembly resolution 2200 A (XXI), annex.

6/ See: *Hague Convention IV and its Annex Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277; Hague Convention V respecting the Rights and Duties of Neutral Powers in Case of Land War, 18 October 1907, 36 Stat. 2310; Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 36 Stat. 2332; Hague Convention IX concerning Bombardment by Naval Forces in time of War, 18 October 1907, 36 Stat. 2415; Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 26 U.S.T. 571; Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction, 10 April 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

9. Article 23. Mercenaries

Article 23 on mercenaries is particularly troubling. The text does not criminalize the acts of mercenaries themselves, but criminalizes only the "recruitment, use, financing or training of mercenaries" by agents or representatives of a State. We question this unduly limited approach. The mercenaries themselves must (by definition) be private individuals; those who recruit, use, finance and train them are often also private individuals or rebels who are not agents or representatives of a State. Moreover, the Code's use of the phrase "the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law" is not defined and is extremely liable to dispute, undermining and potentially politicizing the entire concept of this crime.

10. Article 24. International terrorism

Article 24 purports to punish international terrorism, even though there is no generally accepted definition of "terrorism" and no adequate definition of terrorism is given by the Code. The Code attempts to define terrorism through the use of a tautology. The Code defines terrorism as the "undertaking, organizing, assisting, financing, encouraging or tolerating [by the agents or representatives of a State of] acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public". This definition is patently defective because "terror" is not defined.

Moreover, given the unsuccessful history of past attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of these duties. As listed in General Assembly resolution 44/29 of 4 December 1989, these conventions cover aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

Another fundamental problem with article 24 of the Code is that it limits the crime of terrorism to acts committed by "agents or representatives of a State". In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

11. Article 25. Illicit traffic in narcotic drugs

Article 25 speaks of illicit traffic in narcotic drugs "on a large scale". Apart from the lack of precision of the term "large scale", it is not clear whether the phrase "large scale" is modifying "traffic in narcotic drugs" or "undertaking, organizing, facilitating, financing or encouraging". Therefore, it is not clear whether the individual's role must necessarily be a large one, or whether individuals who play a small role in a large operation are also included. This defect, it may be noted, is common to many of the other articles, in so far as the activities addressed (intervention, aggression, etc.) typically involve many different people, with sometimes incidential roles.

The term "narcotic drugs" is also used in a manner inconsistent with its standard usage in existing international conventions. The Code never defines the term "narcotic drugs", but does attempt to define trafficking in narcotic drugs to include trafficking in narcotic drugs and psychotropic substances. Moreover, the Code also fails to define the term "psychotropic substance". This imprecise use of key legal terms renders this article fatally defective.

Under a series of United Nations conventions culminating in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention), the terms "narcotic drug" and "psychotropic substance" have specific and different meanings. Under the 1988 Vienna Drug Convention, "narcotic drug" means any of the substances, natural or synthetic, in schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 (Vienna Convention, article 1 (n)). In contrast, "psychotropic substances" means any substance, natural or synthetic, or any natural materials in schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971 (Vienna Convention, article 1 (r)). The Code's failure to define these terms, coupled with its attempt to define "narcotics trafficking" as trafficking in both narcotic drugs and psychotropic substances, is an open invitation to confusion and uncertainty.

Article 25 also provides that trafficking in "narcotic drugs" is "illicit" if it is "contrary to internal or international law". It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

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12. Article 26. Wilful and severe damage to the environment

This article, dealing with damage to the environment, is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of "widespread, long-term and severe damage to the natural environment". Similarly, the term "wilfully" is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term "wilfully" could simply mean that the defendant performed an act voluntarily, i.e., without coercion, that had the unintended effect of causing harm to the environment. "Wilfully" could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowing and intending to cause serious harm to the environment. As presently drafted, the meaning of "wilfully" is subject to a variety of interpretations. This confusion is magnified by the Code's failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

Moreover, as with the other articles, this article fails to fully consider the existing and developing complex treaty framework concerning the protection of the environment. 7/

E. Conclusion

The United States cannot support the draft Code in its present form. Furthermore, the United States questions the efficacy of any future efforts to redraft the present Code because of the numerous fundamental flaws that permeate its entire structure.

7/ See, e.g.: United Nations Conference on Environment and Development: Framework Convention on Climate Change, 31 I.L.M. 849 (3 May 1992); Convention on Long-range Transboundary Air Pollution, 13 March 1979, T.I.A.S. No. 10541, 18 I.L.M. 1442 (1979) (supplemented by various protocols); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 U.S.T. 333, General Assembly resolution 31/72; Convention on International Trade in Endangered Species of Wild Flora and Fauna, 3 March 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3; International Convention for the Regulation of Whaling, 2 December 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

URUGUAY

[Original: Spanish]

[17 November 1992]

1. The Government of Uruguay expresses its firmest support for the idea of elaborating a code of crimes against the peace and security of mankind, and is convinced that the entry into force of such a set of norms would contribute in significant measure to the establishment of the universal rule of law through the codification and progressive development of international law.

2. The idea of establishing permanent international criminal jurisdiction of a universal character, and creating for that purpose an international criminal court to try persons held responsible for crimes under international law likewise merits support.

Accordingly, and as a comment on draft article 6, the Government of Uruguay believes that it would be highly conducive to the achievement of the desired aims for the International Law Commission to devote itself, as soon as possible, to the preparation of the statute of such a court.

3. The approach provisionally adopted by the Commission, which consists of proceeding to draw up a list of crimes against the peace and security of mankind and to define them individually in the draft articles, does not warrant any observations.

With regard to the offences listed and their characterization, the Government of Uruguay will reserve its views until the Commission's work has reached a more advanced stage.

4. Despite this reservation, the Uruguayan Government deems it relevant, in connection with draft article 26, entitled "Wilful and severe damage to the environment", to put forward at this stage some comments and observations in accordance with what has been stated by its representatives in various international forums, and especially by the President of the Republic, Luis Alberto Lacalle, in the address delivered on 13 June 1992, in Rio de Janeiro, at a plenary meeting of the United Nations Conference on Environment and Development.

Uruguay believes that an effective defence of the environment is possible only within the framework of international cooperation, through joint action by all States and the conclusion of international instruments setting forth specific, legally binding obligations and conferring jurisdiction on national and international courts, as the case may be, making it possible to hold perpetrators of unlawful acts against the environment effectively accountable.

In this connection, the Uruguayan Government has summarized its views, at the national level, in the bill entitled "Prevention of environmental impact", which has been submitted to the legislative authorities for consideration,

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and, at the international level, in the document entitled "Guidelines for a draft international environmental code", which contains a chapter specifically devoted to civil and criminal liability, which was submitted to the General Assembly at its forty-seventh session.

With specific reference to article 26 as drafted by the Commission and the characterization of the offence envisaged in this provision, on the basis of the observations outlined above, the Uruguayan Government believes that, given the nature of the consequences of the conduct - "widespread, long-term and severe damage to the environment" - the requirement of "wilfulness" should be deleted and replaced by the principle of liability which, in the exceptional case of the environment, should encompass not only instances of wilfully caused damage (wilful wrongs), but also damage caused through negligence or lack of precaution (culpable wrongs), since the interest which it is proposed to protect is, in the final analysis, the survival of mankind.

The Uruguayan Government also believes that it would be appropriate, from the standpoint of rule-making techniques, to follow the methodological approach in several draft articles and to prepare a descriptive enumeration of the principal acts which make up the envisaged offence against the environment for which those responsible are to be punished, be they individuals, corporate managers or representatives of a State.

5. The Government of Uruguay notes with satisfaction the work accomplished by the Commission with regard to the draft articles on the draft Code of Crimes against the Peace and Security of Mankind which have been submitted to the Governments of Member States; it expresses the hope that the Commission will continue to give priority to the pursuit of such efforts.

III. COMMENTS AND OBSERVATIONS RECEIVED FROM NON-MEMBER STATES

SWITZERLAND

[Original: French]

[14 January 1993]

As this is the first time that all the draft articles on the draft Code of Crimes against the Peace and Security of Mankind have been submitted to States, the Swiss Government wishes to start by making some general comments, before presenting observations concerning specific draft articles.

1. General comments

The elaboration of a draft code of crimes against the peace and security of mankind has proved, from the time the International Law Commission began its work, to be an arduous task. This draft deals with a subject which is by no means free from political controversies. Nevertheless, the difficulty of the task does not make it any less urgent for States to adopt such an instrument, as is tragically being demonstrated right now by certain regional situations. There is no doubt whatsoever that the prime concern of States should be to establish rules which are sufficiently precise to serve as the basis for an accusation, in accordance with the sacred principle _nullum crimen, nulla poena sine lege_, whereby no one may be charged with a punished for an offence unless he has violated, by commission or omission, an express provision of the law. Accordingly, the acts which are liable to give rise to conviction must be spelled out clearly. It is essential that penal law should retain its qualities of clarity and predictability. Otherwise, the penalty would be tainted by arbitrariness and would disregard the basic rights of defence. The Swiss Government therefore supports the Commission's decision to opt for an enumerative definition of crimes against the peace and security of mankind rather than a conceptual definition, which would leave too much to the judges' interpretation. The Swiss Government also approves of the inclusion in the draft of provisions recalling such basic rules as _non bis in idem_ (article 9) and non-retroactivity (article 10).

Another general remark appears to be in order. The basic notion underlying the entire Code - at least, as we see it - is that certain acts of an especially serious nature should be criminalized in order to strengthen the peace and security to which mankind is entitled. Thus, individuals who, by their conduct, are considered to have deliberately endangered the peace or threatened the security of mankind would be held personally (article 3, paragraph 1) accountable for their acts before a national or an international jurisdiction. 1/ The Swiss Government endorses this approach, to the extent that it helps to make those who, because of their functions, are able to undermine the very foundations of human society, aware of their responsibilities. Reasons of State cannot be cited as a justification in all cases.

Nevertheless, a difficulty could arise. Violations of the peace are, in essence, the act of a State. Only State organs - in practice, this often means the Government - can commit aggression, resort to intervention or practice colonial domination. It is not certain that violation of obligations incumbent on States in respect of peace-keeping can be the sole subject of an accusation. It can even be asked whether imputing some State acts to individuals is not liable, despite article 5, to lead to a paradoxical result, namely, the attenuation of the international responsibility of the State concerned, inasmuch as enforcement of such responsibility would no longer necessarily constitute the ultimate penalty in international relations. The problem posed by the shift in focus from State conduct to individual culpability might warrant further study by the Commission.

1/ The question of the establishment of an international criminal jurisdiction will, in due course, be the subject of separate observations.

/...

The Swiss Government starts from the assumption that the definitions of key terms will be set out in a special provision of the future instrument. Moreover, in view of the possible differences in interpretation, the draft Code should contain a clause relating to the settlement of disputes between States parties in a manner likely to lead to a legally binding decision.

Lastly, there can hardly be any doubt that the future instrument should deal with the question of penalties. The pronouncement of sentence is an integral part of penal proceedings and, more specifically, of trial proceedings. Moreover, it is hardly likely that an international criminal court, if such a court were to be established, could rule on a defendant's culpability without also having the authority to impose a penalty. It would thus be appropriate to append to the definition of each crime a statement of the corresponding penalty, as is done in the majority of national penal codes. Moreover, the proposal regarding the inclusion of a scale of penalties applicable to all crimes does not appear to be fully consistent with the rule nulla poena sine lege. The latter requires that each incrimination be accompanied by a specific and individualized penalty. Unless that is done, the future Code would simply have a punitive function whereas, ideally, it should also have a preventive function.

2. Detailed observations

Article 3, paragraph 3

In the Swiss Government's view, it would be preferable not to include in the draft the phrase "as set out in articles ...". It is not certain that each of the crimes listed in the draft Code encompasses the notion of attempt. For example, the crime of colonial domination, as defined, appears to imply a minimum of implementation, which would rule out the very concept of attempt. In any case, the phrase is superfluous, since the attempt to commit a crime against the peace and security of mankind - which is punishable - obviously refers to a crime defined in the draft Code and not in another instrument.

Article 6

The provisions relating to extradition are, of course, linked to those concerning the establishment of an international criminal court. Nevertheless, regardless of the choice to be made with regard to jurisdiction, conflicts of jurisdiction may occur where there are several extradition requests. The Commission noted its preference for the State where the crime was committed, to which special consideration should be given. In the Swiss Government's view, this solution deserves support. Indeed, there is no question but that the State where the crime was committed, which is, to some extent, the victim, has a special authority for trying the case. Sometimes, however, the State in whose territory the alleged crime was perpetrated will be subject to pressures that are inconsistent with the proper administration of justice. Likewise, in some cases (apartheid, for instance, as shown by the

Commission), the State in which the crime occurred might well bear direct responsibility for it and might seek to shield the accused. It is thus with good reason that article 6 confines itself to stating a preference for the principle of territoriality and does not establish a genuine rule of priority.

Article 14

The notion of combining in a single article two basic concepts of penal law which are as alien to each other as defences and extenuating circumstances would appear to be questionable. The effect of a defence is to strip the act of its unlawful character on the ground that the perpetrator did not act knowingly and wilfully. In short, responsibility, which is the prerequisite for punishment, is lacking. On the other hand, extenuating circumstances do not strip the act of its unlawful character; they simply moderate its penal consequences. It would therefore be advisable to envisage two separate provisions.

Article 15

The proposed definition of aggression rests mainly - and with perfect justification - on that contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations! In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression, if the Council, which bears the primary responsibility for peace-keeping, had not found it to be so. On the other hand, everyone knows that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council. It is not certain that the security of law would benefit therefrom. To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice. Accordingly, it would be just as well not to include paragraph 5 which appears in square brackets.

Article 16

Article 16 deals with the threat of aggression which, like aggression, is characterized as a crime against peace. Switzerland has already raised the question in the Sixth Committee, during the annual discussion of the Commission's work, as to whether the two should be put in the same category. In other words, should the threat of aggression appear in the draft Code as a separate crime? We may well have doubts about this. How can one convict, if the threat has not materialized, if it has not begun to be carried out? How can a threat, which is punishable, be distinguished from preliminary acts, which are not? It can even be argued that if we criminalize the threat of aggression we may encourage recourse to force in exercise of the right to self-defence, with all the unfortunate consequences that this may entail. What about intimidating manoeuvres consisting of, to quote article 16, "declarations, communications, demonstrations of force", but which, by definition, are not translated into an act of aggression? Do they constitute an act sufficiently serious to be characterized as a crime against peace? We may well hesitate. All in all, the Swiss Government has concluded that it is not advisable to extend the scope of the draft Code to the threat of aggression. In any event it would be difficult to apply such a provision.

Article 17

The major difficulty raised by article 17 probably lies in the definition of intervention. In this connection, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) makes a useful contribution. As the Commission notes in its commentary, intervention must contain an element of coercion, i.e., it must undermine the free exercise of its sovereign rights by the State which is a victim. Criminalization, however, should be limited to the most serious forms of intervention. In practice, only coercion involving the use of military force appears to reflect the degree of seriousness required in order to constitute a crime against the peace and security of mankind.

Article 18

This provision condemns colonial domination and other forms of alien domination established by force. Should alien domination also be understood in the sense of "neocolonialism", as some members of the Commission seem to think? This is doubtful. However reprehensible it may be politically, "neocolonialism" is not a legally established concept. Moreover, it should be noted that "neocolonialism", to the extent that it can be observed objectively, is not necessarily imposed by force as part of a plan or an understanding. It often results from economic disparities between countries and will be very difficult to prove in practice. Accordingly, we wonder it would not be better to delete all references to "neocolonialism" from the commentary on article 18.

Article 22

In international humanitarian law, there are now two categories of violations: on the one hand, there are "grave breaches" which have already been enumerated (article 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 one is consulting, and article 85 of Protocol I additional to the Geneva Conventions which also refers to article 11 of the same Protocol); these are also called war crimes; on the other hand, there are all the other violations of international humanitarian law.

The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of "exceptionally serious war crimes", which would therefore encompass especially serious "grave breaches". Accordingly, we must realize that, once the Code is in force, war crimes not enumerated in this provision may, as a result of article 22, be subject only to a relatively light penalty.

In addition, it is hard to understand why the Commission characterized "large-scale destruction of civilian property" (paragraph 2 (e)) as an "exceptionally serious war crime", but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the red cross and the red crescent.

It would, therefore, be advisable for the Commission to reconsider the impact which this provision is liable to have on international humanitarian law, before adopting it on second reading.

Article 23

In paragraph (2) of the commentary on article 23, entitled "Recruitment, use, financing and training of mercenaries", 2/ the Commission recalls that article 47 of the 1977 Protocol I additional to the Geneva Conventions of 1949, which deals with the status of mercenaries, specifies that a mercenary shall not have the right to be a combatant or a prisoner of war. Two clarifications are needed which could be taken into account in the commentary. The above-mentioned provision enables a State party to the Protocol to deny a mercenary this right; it does not compel it to do so. In addition, the mercenary deprived of the right to be a combatant or a prisoner of war will, like any civilian definitely suspected of engaging in activities hostile to the security of the State, benefit from the provisions of article 5, paragraph 3, of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which guarantees him, in case of prosecution, the right to a fair and regular trial. He will also be afforded the basic guarantees contained in article 75 of Protocol I.

Article 24

It would appear that the elements constituting the crime of international terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subversive or terrorist activities. Does the act, when carried out by agents of a State, of financing or training armed bands for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State come under either provision?

2/ See Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), pp. 65-66.

Article 25

Lastly, the question arises as to whether the inclusion in the Code of a provision on international drug trafficking is warranted. After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narcoterrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals.
